PETITION FOR A WRIT OF CERTIORARI

No. 756

FILED
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HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1952

Docket No. 22490

BASCOM LAUNDER CORP., BLUE ROSE LAUNDRY CORP., MORTON KAISER, DANIEL LEVITT, AL ABRAMS, AL ABRAMS and NATHAN NEWMAN, co-partners doing business as FAVORITE LAUNDERS, SIDNEY BENSON, doing business as BENSON'S, LESTER COOPER and SAMUEL STEIN, co-partners doing business as COOPER AND STEIN, FAVORITE LAUNDERERS, INC., FLEISCHMANN ENTERPRISES, INC., JOHN L. MACKEY, BEVERLY MACHINE SERVICE, INC., DONALD STANLEY ENTERPRISES No. 1, INC., ANTHONY FERRANDINO and VINCENT FERRANDINO, individually and as co-partners, ARTHUR ISQUITH, IRVING RANDELL and MURRAY RANDELL, individually and as co-partners, ARTHUR SLUTSKIN, ANGELO ZAGARDO and FRANK ZAGARDO, individually and as co-partners suing for themselves and for all others similarly situated,

Petitioners,

against

TELECOIN CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Bascom Launder Corporation and 16 others, pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of so much of the judgment of that court filed April

20, 1953 in the above captioned cause as reversed a money judgment entered upon a jury verdict in favor of your petitioners.

Opinions Below

The opinion of the Court of Appeals has not yet been reported. For the Court's convenience that opinion and excerpts from the trial court's charge to the jury (R. Vol. II, pp. 454-484) are reprinted as Appendices A and B, *infra*.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The judgment of the Court of Appeals was entered April 20, 1953.

Questions Presented

Bendix Home Appliances, Inc., sole manufacturer of a patented automatic washing machine of revolutionary design, which bore the famous Bendix trademark and was in short supply, sold this identical machine to 80 distributors throughout the United States. Bendix undertook by contract with respondent Telecoin Corporation, a newly organized distributor, to use its best efforts to stop all other distributors from reselling to a class of customers; namely, commercial operators of such machines. The stated objective was to enable Bendix and Telecoin to regulate the extensive business of commercially operating such machines. Bendix then took vigorous action to prevent and substantially succeeded in preventing resales to commercial operators by any one but Telecoin. Telecoin thereupon imposed upon its customers various restrictions which Bendix approved, including tie-in sales and a system of franchises licensing an invalid "launderette" trade-

mark. The jury found that each of the plaintiffs who purchased from Telecoin was damaged by the contract.

1. Was it reversible error for the trial court to charge that the Bendix-Telecoin "agreement amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law"?

2. Was the Court of Appeals correct in deciding that the Bendix-Telecoin contract "was not unlawful in and of itself," and that "plaintiffs could win only if they proved (1) that Bendix had a monopoly in fact of the product it sold to Telecoin and/or (2) the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade."

3. If the above holding of the Court of Appeals was correct, did not Bendix' patents and trademark *prima facie* establish its market control or monopoly, there being no evidence to the contrary, so that there was no such issue to submit to the jury?

4. The jury having specifically found that the contract proximately damaged each of the 16 plaintiffs who bought machines from the favored distributor, what "economic basis" could the contract have had that required separate submission of that question to the jury?

Statutes Involved

The statutes primarily involved here are Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with

foreign nations, is hereby declared to be illegal * * *. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *." (July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; 15 U. S. Code, Sec. 1.)

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *." (Id., Sec. 2.)

"Sec. 3. That it shall be unlawful for any person engaged in commerce in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of, a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (Oct. 15, 1914, Chap. 323, Sec. 3, 38 Stat. 731; 15 U. S. Code, Sec. 14.)

Statement of the Case

The 17 petitioners were all commercial operators of Bendix fully automatic washing machines. They were either "store" or "route" operators, or both. That is, they operated self-service laundry stores, called launderettes, or routes of machines in apartment house basements, or both. Sixteen of them had bought Bendix machines and other equipment from the respondent Telecoin Corporation.

The issue in the case is the legality of the system which prevailed from 1945 through much of 1947 of distributing Bendix machines to the commercial market.

The case was tried twice. At the first trial, Judge Dewey of Iowa presiding, the jury disagreed (R. Vol. II, fol. 1473). At the retrial Judge Murphy charged that the Bendix-Telecoin distribution agreement amounted to a violation of the Sherman Act as a matter of law. Then he separately asked the jury whether the petitioners or any of them had been injured thereby and if so, what damage, if any, each petitioner had suffered. He reiterated that the petitioners or any of them might have been unaffected or might actually have benefited by the violation of law (Appendix B, *infra*, pp. 36-7, 39-42).

The jury awarded damages separately to each of the 16 petitioners who had bought Bendix machines from Telecoin. "No damages" were found for two operators who had not bought machines from Telecoin, having bought the stores of Telecoin-franchised operators and then signed "launderette" franchises and paid fees.[1]

Bendix was the sole manufacturer of the Famous (Ex. VV, p. 4)[2] Bendix Automatic Home Laundry, which embodied certain revolutionary patented inventions and a trademark (Exs. 74NN, 74NN1, 77, R. Vol. III pp. 275-6, 280; Ex. 297). The Bendix washer was "a new type of washer" developed just prior to the war, said Mr. Layng,

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[1] The only tangible damage these two had suffered was the payment of fees for Telecoin's non-existent "registered" trade-mark. With no instruction that the mark was invalid, the jury logically found "no damage" for these two plaintiffs (R. Vol. II, p. 528). But the jury astutely distinguished in favor of Donald Stanley Enterprises, the only other plaintiff which had not bought from Telecoin. This was the only one of the three whose vendor was subjected to serious threats of reprisal by Telecoin if it sold without requiring the purchaser to sign a "launderette" franchise (R. Vol. II, pp. 182-5; Vol. III, pp. 23-4).

[2] A Telecoin brochure, too big to print. The relevant original exhibits herein are in the Clerk's Office.

a Bendix executive (R. Vol. II, p. 222). "It was an entirely new washing machine", said a Telecoin executive (R. Vol. II, p. 283).

How Vincent Bendix' *patents* "revolutionize[d] the washing machine businesses [sic]", as told by a Telecoin executive with positive personal knowledge (R. Vol. II, pp. 282-4), is set forth as Appendix C, *infra*. (See also preamble to Ex. 11, the Bendix-Telecoin contract, R. Vol. II, p. 536.)

The Bendix machine was concededly "in very short supply" (R. Vol. III, pp. 71, 58). In 1944 it "was practically something new that people had not seen before".[3] As late as July 1946 Bendix' president was looking ahead to some unspecified time "when we get competition" (Ex. 77, Vol. III, p. 280; see also Ex. BBB, R. Vol. III, p. 352).

Respondent offered no evidence that we can find to show that Bendix had no monopoly.[4]

Telecoin Corporation was incorporated in 1943. It immediately became a large commercial operator, taking over the routes of Farny and Percival, who became Telecoin officers. Respondent emphasized the homespun beginnings of the Farny-Percival "route" operation (Appendix A, *infra*, pp. 24-5). But Telecoin's great expansion began in 1945. It was then largely owned by two of Bendix' five directors, Farny and Mr. Sayre, Bendix' president,

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[3] Testimony of Mrs. Broderick, a Telecoin executive and respondent's witness (R. Vol. II, pp. 395-6).

[4] Respondent's counsel asked one petitioner whether he had ever gone to Thor, Westinghouse or F. L. Jacobs (Launderall) (R. Vol. II, p. 271); but this does not seem to amount to evidence. Petitioner's counsel then read a statement from the prior trial that Thor made no fully automatic machines at least through 1949 (R. Vol. III, p. 143). Westinghouse could not make deliveries during most of 1946 and a Westinghouse franchisee paid rent for 8 or 9 months then while waiting for machines (Typewritten Record, pp. 1778-9, 2405).

and Mrs. Sayre (Ex. 230 for Identification).[5] Farny directly and indirectly owned 47,985 shares of Bendix Home Appliances common stock, evidence of whose dollar value was excluded (Typewritten Record, 1962-4, 1966-7).

In 1945, Bendix, which had previously sold its entire production outright to regular distributors, granted Telecoin a monopoly, we submit, of the business of selling its machines to commercial operators. By contract (Ex. 11, R. Vol. II, pp. 536-41) Bendix purported to grant Telecoin the exclusive right to buy Bendix machines from the regular distributors when intended for multiple (i.e., commercial) use or for resale for such purpose (Id., par. 1). Bendix agreed to use its best efforts to obtain from the other distributors a modification of their agreements to the effect that they would sell to no one but Telecoin when intended for such use (Id., par. 2).

The stated purpose of the contract was that the "extensive business" of commercial operation of Bendix machines "be centrally organized and regulated" by Telecoin, in line with its "uniform method of operating such machines" (Id., preamble). Telecoin was to enter into "Franchise Agreements" with Operators. It agreed to submit to Bendix for approval all such agreements and to make no agreements with any one "other than those approved by Bendix" (Id., par. 12). All agreements with operators were to be subject to the conditions and reservations of the contract (Ibid.). Bendix could terminate the agreement if in its sole discretion it determined that, for any reason, operation of Bendix machines by Telecoin *or its operators* did not reflect credit upon Bendix products (Id., par. 14).

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[5] Exhibit 230, Minutes of a Bendix board of directors' meeting, reprinted in full at R. Vol. III, pp. 336-9, was excluded from evidence (Typewritten Record, pp. 1892-3)—improperly, as petitioners argued in the Court of Appeals. Since the trial court's charge should be sustained if it was correct on any proper theory (See *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 281), we take the liberty of citing this exhibit and one other (Ex. 148 for Identification, *infra*, pp. 16, 20-1), likewise improperly excluded from the jury on respondent's objection, we believe.

Perhaps aware of its broad indirect powers over operators under the agreement, Bendix was indemnified by Telecoin from any taxes imposed on account of wages paid to any employee of Telecoin and/or its operators (Id. par. 11).

The franchise arrangement was carried out by preparation and execution from May to September 1945 of an omnibus franchise (Ex. 122, R. Vol. II, p. 552) by all of Telecoin's operators (R. Vol. III, p. 220). This initial form of franchise, providing at its foot for Bendix' approval, and spelling out the restrictions imposed on the operator's business, was patently illegal, we submit. In January 1946 Telecoin began to use a briefer, vaguer franchise form (Ex. 19, R. Vol. II, pp. 543-4).

"Bendix Automatic Home Laundrys * * * for use in retail stores are [were] sold by the Telecoin Corporation *only* under a franchise * * *" (Ex. 26, R. Vol. III, p. 236; introduced in evidence at Typewritten Record, pp. 542-3; Italics in original). This positive statement in Telecoin's 1945-6 sales literature, several copies of which were introduced in evidence and identified by various witnesses, demolishes the flimsy testimony that franchises were voluntarily signed to obtain the use of the name "launderette" (Appendix A, *infra*, p. 30, note 5). See *United States* v. *United States Gypsum Co.*, 333 U. S 364, 396. There this Court reversed a trial court's findings for a defendant because of contradiction by documents less precise than this.

The franchises required petitioners to pay a monthly fee per machine and to construct, decorate and operate their stores according to "launderette" standards and specifications. In return Telecoin granted the right to use its trademark which it said that it had registered but had not. The mark having been registered in December 1950, the Court of Appeals ordered it cancelled as "merely descriptive" (Appendix A, *infra*, p. 30).[6]

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[6] Without discussing either the issue whether registration had been fraudulently obtained; or the antitrust significance of nation-wide licensing of an invalid trademark. Cf. *Kellogg Co.* v. *National Biscuit Co.* (2 Cir. 1934), 71 F. 2d 662, 666.

By April 1, 1947 Telecoin had 1,000 launderette franchises (Ex. VV, p. 2). The franchises were "directly under [its] control," said respondent (Ex. 228, Launderette Patent Office File, p. 6).

Apartment house operators were required throughout 1945-6 to buy a meter from Telecoin with each machine. Respondent disputed this. But Telecoin produced 11 operator-witnesses, not one of whom had bought a single unrestricted machine prior to April 1947; that is, without either a meter or franchise.

As soon as respondent's partly owned subsidiary, American Time Corporation, was able to deliver meters, it was these meters that respondent tied in with the Bendix machines (e.g., R. Vol. III, p. 167). Prior to that respondent tied in the Baessler meter. For a while the Telecoin-American Time meters were delivered in separate cartons, which operators did not even bother to open (R. Vol. III, pp. 91-2, Ex. 126—an unopened carton). Meters were attached to the machines by Telecoin, one of its store-operator witnesses admitted, though he had ordered the machines without meters; when they arrived with meters, he just disconnected them and left them in the machine without ever trying to sell them (R. Vol. III, pp. 199-200).

Every one approached distributors to try to get away from buying through Telecoin; and "there wasn't an operator in the country that wasn't trying to buy from distributors", testified respondent's witness Layng, a Bendix executive (R. Vol. III, p. 54; Vol. II, fol. 700). Indeed, except during the period of the restraint, Bendix' 80 regular distributors were the normal source of machines for commercial use (R. Vol. III, pp. 160, 176-7, 204; Vol. II, fol. 1292; cf. fol. 844). But the Bendix-Telecoin arrangement, channeling operators to Telecoin, denied them and the public the benefits of a free market.

Bendix knew "that Telecoin followed various restrictive practices such as granting exclusive territories" (R. Vol. III, p. 61). Bendix approved making the operators' franchises harsher, writing Telecoin (Ex. 69N, R. Vol. III, p. 253):

> *"The new 'Operations Agreement' is certainly excellent and the penalty clause will really make an effective method of getting the stores up to the standard we both desire."* (Italics supplied.)

Bendix took "vigorous" steps to bar its regular distributors from selling in competition with Telecoin and wrote Telecoin (Ex. 69K, R. Vol. III, p. 252, etc.):

> *"Very concerned on the reported infringement of sales to unauthorized self-service operators.*
> *"Have discussed this with Mr. Linville and can assure you that vigorous action will be taken with all our distributors to clear this matter up immediately."* (Italics supplied.)

Telecoin's sales manager, Doherty, tracing a distributor's claim of a territorial "infringement", found it hard "to believe that he could get any new machines in New York other than through myself" (Exs. 229A and D, R. Vol. III, pp. 333, 335).

Telecoin's president thought Bendix "probably had some understandings with the dealers" (R. Vol. III, p. 149).

Bendix, Telecoin and the distributors continually policed their artificial channels of distribution for "leaks". Investigations were made through serial numbers (cf. Exs. 202 and 202A). But serial numbers were defaced by independent operators who managed to buy from forbidden sources (Exs. 87, 229A, R. Vol. III, pp. 287-8, 333). Bendix, "quite disturbed", thought "a hidden serial number" or a specially equipped commercial machine might solve "the problem of trans-shipping" (Exs. 200-1, 229C, R. Vol. II, pp. 311-2, 334).

Elwell, a former Telecoin man "attempting to short circuit Telecoin's program", was denounced for selling "at greatly reduced prices" (Exs. 203A-B, R. Vol. III, p. 313). At Bendix's request (Ex. 74EE) the sales manager of its Colorado distributor made a personal investigation (Ex. 74DD); Telecoin received his report (Ex. 74BB). He sent Telecoin directly a copy of a follow-up report to Bendix (Ex. 203C).

Great effort was made to "stop New York operators from trans-shipping" (Ex. 6902). At least seven letters concerned a single "infringement" (Ex. 69F, R. Vol. III, p. 250) supposedly made by a Fred Schafer before "he was refranchised" by Telecoin in June, 1946 (Ex. 6905, R. Vol. III, p. 254). Bendix' Mr. Layng wrote to the Catskills distributor (Ibid.):

> "* * * *We do not want to give you a run-around on this matter but Telecoin and ourselves are unable to discover any way in which Schafer could have gotten his hands on new machines at the time of this transaction, so would appreciate any light you can throw on the deal."* (Italics supplied.)

Difficulty occasionally arose in enforcing the lines of distribution, especially when Telecoin was delinquent in its obligations to distributors; but Bendix still made every effort to keep such a distributor "lined up" (Ex. 74G, R. Vol. III, p. 259).

Hommel & Co., the Pittsburgh distributor, precluded from soliciting apartment house trade (Ex. 16, R. Vol. III, p. 233), understood "that the coin-meter must go through Telecoin", but asked "if there are any exceptions to that in a city such as Pittsburgh", where the apartment installations were "badly neglected" and the users dissatisfied; and said it could do a better job and sell over 300 machines "if the factory would grant approval" (Exs. 17, 18, R. Vol. III, pp. 234-5; see Ex. 74T). But the slovenly, absentee-ownership arrangements for Pittsburgh apartment house

machines survived a long barrage of criticism (Exs. 74H-H1, R. Vol. III, p. 260; Exs. 74OO, 74U-V, 74VV).

So firm was Telecoin's control that it could at will establish and disestablish statewide sub-monopolies (Ex. 74H1, R. Vol. III, p. 260):

> "* * * I gather Telecoin is going to look around for another operator in this area. A bit of competition may go a long way toward waking up the Nelson Bros." [to whom Telecoin had given "the exclusive apartment house set-up in Pennsylvania" (Ex. 69E, R. Vol. III, p. 249)].

The man whom Telecoin gave "a coin operation deal for most of Oklahoma" likewise served the public poorly through his "remote control" and caused "several good prospects" to be refused machines (Ex. 74FF, R. Vol. III, p. 268).

The Washington State distributor refused to install Bendix machines for a Mr. Stern, who had been franchised by Telecoin in Boston, since they had "no official notice that Mr. Stern is a bona fide Telecoin operator" (Ex. 74X, R. Vol. III, p. 266). Bendix then asked Telecoin to "make a decision whether or not to permit Stern to operate in that area or to open up your own operation" (Ex. 88, R. Vol. III, p. 289).

Bendix, Telecoin and distributors also investigated independent operators in Nebraska, Memphis, San Diego, Philadelphia, New York City and Missouri (Exs. 14, 15, 87, 200-1, 203A-B, 220B, 229A-B, R. Vol. III, pp. 231-2, 287-8, 310-3, 327-8, R. Vol. III, p. 231) and cut off such operators' supply of machines and parts (Ex. 87, R. Vol. III, p. 287). Telecoin was ready to "put the clamps" on an operator who might try to "muscle in" [compete?] in Richmond, Virginia (Ex. 269, R. Vol. III, p. 345).

A Memphis man, not a party, futilely went over Telecoin's head to Bendix (Dep'n of Mr. Cason, R. Vol. III, pp.

6-7). One man of independence defied both Bendix and Telecoin and was promptly boycotted by order of the Minnesota distributor (Dep'n of Lt. Atlas—not a party—R. Vol. III, pp. 154-60).

For his acquiescence in respondent's monopoly, after execution of the Bendix-Telecoin contract, each distributor was paid a $10 "override" on every Telecoin machine in his territory, or $1,280 on every carload (Exs. 165, 165A, R. Vol. III, pp. 302-3).

Respondent perhaps showed that distributors performed some services in return for the "override." But the court below erred in saying that the override might just have "covered costs to distributors of services performed and of carrying special inventory for the commercial machine". There was then no commercial model; the override and sale of parts were each profitable (Layng's cross-examination; R. Vol. III, pp. 59-60). Some large distributors made "$6000 to $8000 in rebates" in a few months, "and they were doing very little for it" if (Ex. 74D, R. Vol. III, p. 256), often with respect to stores of whose very existence they were for many months unaware (e.g., Exs. 204A-B).

The alleged services were no more than the normal distributors' functions, which Telecoin was not equipped to perform (*infra*, p. 14). These functions the distributors presumably performed for their own customers with no compensation but their regular selling price, which was less than respondent's.

The override was entirely at the expense of petitioners and other operators. Bendix charged Telecoin an extra $10 per machine and remitted this $10 override to the distributor. The override included in Telecoin's cost figures, was passed on to petitioners, together with an additional percentage thereof as mark-up, as permitted by OPA regulations (R. Vol. III, p. 225).

Even apart from the override, which inflated its cost figures, respondent's prices were consistently higher than

the other distributors'. Its percentage mark-up of Bendix machines in 1945-7 was about double that of other distributors.[7]

About September 1, 1947 Telecoin charged $179.50 each for five machines (Ex. 115) against the Oklahoma distributor's price of $143.44 for a single machine (Ex. 221, R. Vol. III, p. 329).

One Bendix retail dealer, barred by the conspiracy from using his own machines to set up a laundry store, agreed to buy from Telecoin although *"knowing he has to pay a premium to obtain them"* (Letter from the Kansas City Bendix distributor to Bendix; italics supplied) (Ex. 220B, R. Vol. III, p. 328).

The artificiality of placing Telecoin athwart the normal stream of distribution repeatedly appeared. Telecoin did not perform many of the functions of normal distributors, whose markups were lower. Even the simple function of distributing a factory service manual to commercial operators was left to the regular distributors (Ex. BBB, R. Vol. III, p. 352).

"Discounts on parts" were claimed in the court below as an "essential feature" of the "Launderette" system. But Telecoin gave no discounts because it did not even perform the distributor's basic function of selling parts. Operators had to buy parts from the regular distributors.

The Court of Appeals, perhaps swayed by the fact that Bendix later made a commercial model which it sold exclusively to Telecoin, bypassed the main issue which was squarely argued at the trial (Appendix B, *infra*, pp. 33, 39, 45-6). Was it lawful to restrain trade among distributors of the *identical* standard machine?

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[7] The undisputed evidence of costs and markups (Exs. 34-5, 115, 117, 141, 143, 169, 176 and 189, R. Vol. III, pp. 295-6, 307-8, 310) was carefully spelled out to the jury (Typewritten Record, pp. 3414-22).

Bendix and Telecoin had at least one ulterior motive for introducing a commercial model: It was to be "the eventual solution" to "leaks" of machines to "unauthorized" buyers (Exs. 200-1, Vol. III, pp. 311-2).

Telecoin did not get approval for a commercial model, presumably from New York City, until September 23, 1947 (Ex. 74C; R. Vol. III, p. 162), i.e., after the restraints of which petitioners complain. Even then that model was only a "reinforced" standard Bendix (R. Vol. II, p. 219).

The Bendix standard machine was quite durable (Ex. 74R, Vol. III, p. 265). The first launderettes in 1944 and 1945 were successfully opened with second-hand pre-war machines, many of which had been abused (R. Vol. II, pp. 293, 302).

The machine which plaintiffs tried to purchase from regular distributors was the Standard Bendix Automatic Home Laundry (e.g.; R. Vol. III, p. 162). It was the sale of that standard machine that was restrained and prevented.

Specifications of Error to be Urged

The Court of Appeals erred in:

1. Holding itself "bound" in this case by *United States* v. *Bausch & Lomb Optical Co.*, 45 Fed. Supp. 387, 398-9, aff'd 321 U. S. 707, 719 (Appendix A, *infra*, p. 28).

2. Holding the Bendix-Telecoin agreement to be an exclusive dealing arrangement like that in *Bausch & Lomb, supra.*

3. Ruling that the trial judge should have asked the jury to determine whether or not "Bendix had a monopoly in fact of the product it sold to Telecoin" (Ibid).[8]

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[8] Respondent itself proved that *Bendix* had some sort of monopoly. See Appendix C, *infra*, pp. 47-9. Respondent's only exception

4. Ruling that the trial court should have asked the jury whether the Bendix-Telecoin arrangement "was without a reasonable economic basis and merely served as an instrument for unduly restraining trade" (Ibid).

5. Failing to hold admissible two certified publications of the Bureau of the Census, Industry Division (Ex. 148 for Identification) [9] which evidenced the total domestic production figures in certain categories of washing machines.

6. Reversing the judgment of the trial court.

Reasons for Granting the Writ

Radically extending this court's decision in the *Bausch & Lomb* case, the court below created a new legal concept and undercut the significance of leading Sherman Act cases.

1. The result is a radical extension of *Bausch & Lomb.*

(a) The principal decision is based entirely on

> *"United States* v. *Bausch & Lomb Optical Co.,* 45 Fed. Supp. 387, 398-9, by which we feel bound since, on the matter here pertinent, the Supreme Court affirmed in 321 U. S. 707, 719 (although by a four-to-four decision and without opinion)." [10]

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on monopoly was that: "There was no evidence of any monopoly in *Telecoin*" (R. Vol. II, p. 487). (Italics supplied.) Compare the opinion below, Appendix A, *infra*, p. 28, note 1.

[9] These documents are among the original exhibits transmitted to the Clerk of this Court. They were urged in petitioners' brief below, but were not referred to in the printed record.

[10] The only other citation for reversal was a "See also" citation of *United States* v. *Kissel & Harned,* 218 U. S. 601, 608, the relevance of which is obscure, unless it is thought in some way to qualify the rule that the Sherman Act is violated by a scheme which empowers one to injure others, not by the actual damage inflicted. *United States* v. *Socony Vacuum Oil Co., supra,* 310 U. S. 150, 252.

(b) A new legal concept was born below: a non-exclusive exclusive. Telecoin at 44th Street and Bruno-New York, Inc. at 34th Street sold the same machines at the same time and in the same territory. Telecoin likewise sold in every other Bendix distributor's territory the identical machines which those distributors were precluded from selling to any customer or competitor of Telecoin—actual or potential.

All this restraint was justified by the court below as an exclusive distributorship under the *Bausch & Lomb* case. But Bausch & Lomb had granted a true exclusive: It sold pink-tinted lenses exclusively to Soft-Lite. Never having distributed such lenses to any one but Soft-Lite (Singer), Bausch & Lomb had no distributors to restrain. We submit that a contract the purpose and effect of which is to give one distributor the exclusive right to resell to a certain class of customers, and to prevent other distributors from reselling to that class is unlawful *per se*.

(c) Bausch & Lomb had no *patent* or other monopoly.

> "The lenses and the tinted glass from which they are made are *not patented* but are made according to specifications given to Bausch & Lomb by [Soft-Lite] (R. 466)" (Italics supplied) (Brief for Soft-Lite et al., p. 9).

Moreover, it was found that "Bausch & Lomb did not enjoy a monopoly" (Finding of Fact No. 33).

(d) "The exclusive manufacturing agreement * * * between Bausch & Lomb and Soft-Lite has no connection with the Soft-Lite distribution system. * * * Bausch & Lomb has played no part in the establishment, operation or maintenance of the Soft-Lite distribution system * * * " (Finding of Fact 32). But the restrictive launderette franchise distribution system had its birth in the Bendix-Telecoin contract. And in practice Bendix approved heightened restrictions on operators (*supra*, p. 10).

(e) The Soft-Lite arrangement was quite special. It was "functionally a joint enterprise" (45 F. Supp. at 398), a "manufacturing arrangement" (Id. at 397-8), necessary because Soft-Lite glass had to be made to specifications, unlike the Standard Bendix Washer (See R. Vol. III, p. 162). The Singers (Soft-Lite) had turned over their trade secrets and customers' lists to Bausch & Lomb. They would have been ruined, argued their counsel, who happens also to be counsel for respondent herein, by cancellation of the arrangement.

2. The court below insists that a jury determine the validity of an agreement which (a) suppressed competition among the distributors of a patented article, (b) allocated customers to a favored distributor, (c) exempted that distributor from all competition in a distributive market previously shared with others, (d) empowered the favored distributor-operator to regulate or suppress other operators who would compete with it, and (e) resulted in an inescapable price premium to that favored distributor.

This reverses the trend which commentators perceive in this Court's Sherman Act decisions toward finding *per se* violations. It encourages a flabby practice of dropping everything into the jury's lap with one catch-all question: Was it reasonable? This practice may inordinately increase the time consumed in jury trials and heighten the unavoidable uncertainty of which businessmen complain in the antitrust laws.

Specifically, the result conflicts with at least four major principles:

(a) Conspicuous among controls which the Sherman law prohibits is "the suppression of competition among the purchasers of the patented articles." *Ethyl Gasoline Corporation* v. *United States, supra*, 309 U. S. 436, 452, per then Mr. Justice Stone. See also *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373, 409 per then Mr. Justice Hughes. Yet such

suppression was precisely the purpose and effect of the Bendix-Telecoin agreement.

(b) Even the common law condemned contracts "to * * * apportion customers." See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497, per then Mr. Justice Stone. Analytically, the Bendix-Telecoin arrangement was an apportionment or allocation of a large class of customers to Telecoin; not a contract to be the exclusive dealer in a certain product.

(c) It is "unreasonable, *per se*, to foreclose competitors from any substantial market." *International Salt Co.* v. *United States*, 332 U. S. 392, 396, per Mr. Justice Jackson. The very object of the contract here was to foreclose distributor competitors from selling to the market comprising the commercial operators of Bendix machines. And in performing the contract, as the documentary evidence shows, Telecoin's operator-competitors were sometimes excluded from buying in that market.

(d) The dual role of supplier and competitor may not be used to stifle the competition of one's customer. *United States* v. *Klearflax Linen Looms, Inc.* (D. C. Minn. 1945), 63 F. Supp. 32, digested in Oppenheim, Cases on Federal Anti-Trust Laws (1948) 716.

(e) Agreements "which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints * * *." *Ethyl Gasoline Corporation* v. *United States, supra*, 309 U. S. at 458. Accord: *United States* v. *Socony Vacuum Oil Co. Inc.*, 310 U. S. 150, 213.

The Bendix-Telecoin agreement empowered Telecoin to maintain a much higher selling price than did the regular distributors (even though it did not perform their functions) (*supra*, pp. 13-4).

3. Most regressive is the ruling below that monopoly must be found as a fact by a jury on a statistical basis, even in the absence of evidence of no monopoly.

(a) It disregards the rule that a patent is "at least *prima facie*" evidence of market control. See *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 307.

(b) It disregards the undisputed presence, shown by respondent's correspondence, of these classical indicia of monopolistic restraint:

> Maintenance of a two-price distribution system.
>
> Maintenance of a damaging tie-in system.
>
> Nationwide franchising of an invalid trademark.
>
> Nationwide policing of a distribution system through tracing serial numbers and otherwise, counteracted by defacement and removal of serial numbers by independent operators.
>
> A nationwide boycott of independents with "vigorous action" based on the above policing.
>
> A nationwide system of exclusive territories and territory protection with state-wide and other territorial monopolies and sub-monopolies arrogated by the favored distributor or granted to favored franchisees.
>
> Exclusion and attempted exclusion of unfranchised operators from the self-service laundry business.
>
> Initial imposition of a flagrantly illegal franchise on all operators (Ex. 122, R. Vol. III, p. 553).

4. The decision below severely handicaps antitrust plaintiffs, perhaps including the United States, by excluding the conclusive proof, which its opinion seems to require, of defendant's statistical position in an industry. Petitioners showed that Bendix made 287,195 washing machines in 1946 and 600,458 in 1947 (R. Vol. II, p. 253), all fully automatic, then offered industry totals so that Bendix' percentage could be computed. The trial court excluded a certified copy of two publications of the Bureau of Census, Industry Division (Ex. 148 for Identification, offered at Typewritten Record, pp. 1450-1, 1609-13, 1769), on respondent's objection that the documents were "irrelevant and immaterial." These documents were actually competent, we believe, and

should have been considered either as evidence or as matter for judicial notice by the Court of Appeals if necessary to perfect the proof of Bendix' dominant position in the washing machine industry. *Wigmore* (3rd ed. 1940), Secs. 1670-1. In Ex. 148 figures for fully automatic, semi-automatic and spinner-type machines were "combined to avoid disclosure of operations of individual companies." But the Government figures corroborated the Association figures within 2 to 3% wherever comparable. And total domestic production even of the broad category was only 1,305,000 in 1947. Thus Bendix' 600,000—all fully automatic—were 46% of the national production of all non-wringer machines, many of which could not compete with Bendix in the self-service laundry industry (Cf. Appendix C, *infra,* p. 49).

The admissibility of census figures of production is an important question, especially if the opinion below stands, stressing statistical proof of market control. Often census statistics are the only practicable basis for establishing *prima facie* the industry-wide production totals from which to compute a defendant's statistical position in the industry.

5. The ruling that the restrictive distribution contract might have had possible economic justification is unique in that the jury found that the contract proximately damaged every one of the 16 plaintiffs below who had bought Bendix machines from Telecoin. It seems incomprehensible that a restrictive system of distribution, so uniformly damaging to its customers, could possibly be justified.

6. The holding that the value of the services that Telecoin may have rendered to its operators might justify the distribution contract (Appendix, *infra,* p. 30, note 5) is novel. Such services did not help the independents whom respondent boycotted and excluded. At most the value of the services would affect the issue of damages, already decided by the jury. At bottom this is merely the converse of

the old, old excuse of the price-fixer that his prices were reasonable for the services rendered. This Court spares the district courts a labyrinthine inquiry into the reasonableness of prices fixed in restraint of trade. *United States v. Trenton Potteries Co., supra,* 273 U. S. 392, 397-8.

7. Assuming that the court below correctly held, contrary to the authorities above cited, that the agreement might be economically justified by the value of services rendered or by any other of its consequences, this Court should illuminate the nature of such a new and important defense to antitrust suits.

8. If this Court finds that the trial court was right and a new trial is averted, the district court will be spared a heavy burden. Each of the two trials herein lasted almost six weeks. In no jury case in the Southern District of New York for at least 20 or 25 years has the number of parties been so great and the issues so complex (R. Vol. 1, p. 14).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

CYRUS AUSTIN,
DAVID H. ISACSON,
of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 108—October Term, 1952.

(Argued December 8, 1952 Decided April 20, 1953.)

Docket No. 22490

BASCOM LAUNDER CORP., *et al.* * * * individually and as co-partners suing for themselves and for all others similarly situated,

Plaintiffs-Appellees-Appellants,

—v.—

TELECOIN CORPORATION,

Defendant-Appellant-Appellee,

—and—

ARTHUR W. PERCIVAL and ARTHUR W. MELROY,

Defendants-Appellees.

Before:

AUGUSTUS N. HAND, CHASE and FRANK,

Circuit Judges.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York, entered on a verdict, Murphy, *J.*, presiding. Reversed and remanded on defendant's appeal; reversed and remanded on plaintiff's cross-appeal, with directions to enter an order cancelling the defendants' trademark.

* * * * * *

This is an appeal and cross-appeal from a judgment entered after a jury trial in a treble-damage suit under the Anti-trust statutes. The complaint alleged that defendant Telecoin (1) made illegal tie-in sales to plaintiffs, in violation of § 3 of the Clayton Act, and (2) conspired with Bendix Home Appliances, Inc., a manufacturer of washing-machines, and Bruno-New York, Inc., Bendix's New York distributor, to deny plaintiffs access to Bendix automatic washing-machines for commercial use except through Telecoin, in violation of §§ 1 and 2 of the Sherman Act. The plaintiffs are either "store" or "route" operators, or both (the meaning of these designations will later appear), of Bendix Home Laundries. Originally four, the number of plaintiffs increased when the suit was converted to a class action under Rule 23(a)(3) by court order.

The defendants were originally Bendix, Telecoin and Bruno. The action was discontinued, without prejudice, against Bendix and Bruno by stipulation. The suit against the remaining defendant, Telecoin, was consolidated with actions against Farny, a director of Telecoin, and Percival and Melroy, officers of Telecoin. The claim against Farny was later dismissed by judgment.

The first trial ended in a jury disagreement. At the end of the second trial, verdict and judgment were had for seventeen of nineteen plaintiffs against defendant Telecoin, but not against Percival or Melroy. The evidence at the trial showed the following:

In 1937, Bendix Home Appliances, Inc., began producing an automatic home laundry machine. In late 1938, Farny

and Percival, as partners, bought several of these machines from Bruno-New York, a Bendix distributor, equipped them with coin meters, and installed them in the basement of an apartment-house for use by the tenants. Success prompted them to expand and they added personnel. They began by contracting with landlords for permission to install a group of machines. The machines and the "location" would then be sold to an "operator", the partners making the installation. It was possible for an "operator" to maintain and monitor several installations; this has been given the name of a "route".

In 1943, a corporation was formed under the name "Telecoin Corporation," the defendant here to take over the partnership business. This corporation operated a "route" of some 600 machines. In late 1944, the corporation opened its first "store," a battery of machines operated on a self-service basis, and the name "Launderette" was originated to apply to such operation.

As the number of store operators multiplied, Telecoin experimented with different hot-water boilers, wallboards, and flooring. When it became apparent that the Bendix designed for home use would not stand up under commercial use, *i.e.*, use in stores and apartment-houses, Bendix, beginning in 1947, put out commercial models provided with a heavy-duty clutch, a third bearing and a larger driveshaft.

In 1945, Telecoin and Bendix entered into an agreement by which Telecoin was designated the exclusive distributor of Bendix machines to "route" and "store" operators, and promised to promote sales and installations of the Bendix for commercial use and to use Bendix equipment exclusively, and to maintain or cause to be maintained "in first-class operating condition" all such Bendix machines. Bendix agreed to "use its best efforts" to obtain a modification of existing agreements with its other distributors to protect Telecoin's market, and Telecoin agreed to use Bendix

equipment exclusively. The contract provided that Telecoin should buy the machines from other distributors. But as it worked out, the machines were sold directly by Bendix to Telecoin. When Telecoin remitted to Bendix, the latter sent a $10 "override" to the distributor in whose geographical area the machine was sold.

Telecoin drew up a "franchise" agreement for store-operaors who wished to use the trademark "Launderette." Under this agreement, the operator had to pay a monthly franchise fee on each machine and to construct, decorate and operate the store according to "Launderette" standards, as set by Telecoin. Plaintiffs' witnesses testified that, under this franchise, the operator had to buy equipment such as meters, clocks, scales, soaps and signs from Telecoin, and that machines were impossible to obtain without signing such franchise. Defendant's witnesses testified that the signing of franchises was purely optional, and that, in return, the operator was granted the use of the trademark and certain services such as instructions for operators, discounts on parts and territory protection.

The jury, in response to interrogatories on the Clayton Act issue, found (1) that defendants had made tie-in sales of meters, boilers, clocks, soaps, scales and/or schedule pads, upon which sales of machines were conditioned, but (2) that the effect was not "such as to substantially lessen competition or tend to create a monopoly in any line of commerce," as required by the Clayton Act.

On the Sherman Act issue, the court charged the jury that the agreement between Bendix and Telecoin "amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law." The jury answered affirmatively the question whether the plaintiffs had been injured by anything forbidden by the anti-trust laws and done by the defendant, and awarded damages to seventeen of the nineteen plaintiffs.

As part of its defense, the defendant set up the fact that it had registered the trademark "Launderette" with the United States Patent Office. Evidence was introduced by plaintiffs to show that the registration had been fraudulently obtained. Plaintiffs sought to have this trademark cancelled. The trial court did not submit this to the jury, and denied the relief without giving reasons. Plaintiffs also moved to have the judgment held open to permit intervention by other parties similarly situated; this was also denied.

The defendant appeals from the judgment entered on the verdict. The plaintiffs, in their cross-appeal, seek modification of the judgment; they ask this court to order that the trial court (1) direct cancellation of defendant's trademark "Launderette," and (2) hold open the judgment for a reasonable time, allowing intervention by other parties similarly situated.

FRANK, CIRCUIT JUDGE:

I. Defendant's Appeal

1. *The Clayton Act issue.*

The complaint charged the violation of §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act. Plaintiffs demanded a jury trial. The jury found that the defendant sold Bendix machines to the plaintiffs under tie-in contracts restricting the use of meters, boilers, clocks, soaps, schedule pads, and like commodities, to those supplied by the defendant. The jury also found that such tie-in arrangements did not tend to create a monopoly or substantially to lessen competition in commerce. Whether or not this latter question was correctly submitted to the jury under *International Salt Co.* v. *United States,* 332 U. S. 392, see Lockhart & Sacks, Exclusive Arrangements, 65 Harv. L. Rev. 913, is not before us, since plaintiffs have not appealed as to that aspect of the case.

2. *The Sherman Act issue.*

(a) Defendant argues that the judgment cannot stand because the jury returned a verdict inconsistent in respect to damages. Apart from the fact that, if there were inconsistency, it would not ordinarily cause reversal, we see none here: As the jury found no violation of the Clayton Act, it could of course award no damages on that account. But if the Sherman Act was violated, the actual damages flowing from that violation may well have included the additional amount which the plaintiffs had to pay because of the tie-in purchases they were compelled to make. Cf. *Federal Trade Commission* v. *Motion Picture Adv. Co.*, 344 U. S. 392, 397.

(b) The judge said in his charge: "We come now to the second final theory upon which the plaintiffs might possibly recover. As we have already indicated, this theory arises from a conspiracy and combination of defendants with * * * Bendix, the manufacturer, and its distributors, especially Bruno-New York, Inc. It is based upon violation of the Sherman Act and especially Section 1 of that act. * * * The principal evidence offered in support of this conspiracy theory is a written contract between Bendix and Telecoin * * *. This agreement amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law." Defendants' counsel made a timely objection.[1] The judge's statement was erroneous, for it amounted to a directed verdict for plaintiffs on this issue (except as to damages to the several plaintiffs). *This was wrong in the light of United States* v. *Bausch & Lomb Optical Co.*, 45 Fed. Supp. 387, 398-399, *by which we feel bound since, on the matter here pertinent, the Supreme Court affirmed* in 321 U. S. 707, 719 (*although by a four-to-four decision and without opinion*).*

[1] "I object to that portion of the charge wherein your Honor instructed the jury that the agreement between Bendix and Telecoin is a conspiracy as a matter of law."

* Italics supplied.

There a manufacturer agreed to sell one of its products to no one other than a single distributor. Judge Rifkind—relying on *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 471, affirmed 175 U. S. 211, and on the Restatement of Contracts §§ 515 and 516—said that the Sherman Act was not violated, because the manufacturer had no monopoly of the product, and the "restraint of trade" was (a) ancillary to a reasonable main purpose—a source of supply to the distrbutor—and (b) fairly protective of that distributor's interests but not so large as to interfere with the interests of the public.

The contract in the instant case was therefore not unlawful in and of itself.[2] The plaintiffs could win only if they proved (1) that Bendix had a monopoly in fact of the product it sold to Telecoin and/or (2) the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade.[3] The error in the charge might have been harmless if the evidence as to (1) or (2) had been so indisputable as to leave nothing for the jury to decide on the issue.[4] The evidence, however, was not so unequivocal, but, being in conflict and resting on oral as well as documentary evidence, was such that the jury might reasonably

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[2] See also *United States* v. *Kissel & Harned*, 218 U. S. 601, 608.

[3] Plaintiffs point to facts which they assert differentiate this case from *Bausch & Lomb*, *supra*, *viz.*, that this was not really an exclusive distributorship, that Bendix was implicated in the restrictions on the operators, and that Bausch & Lomb had no patent or monopoly. We think none of these factors significant: Telecoin was an exclusive distributor in the commercial field, and the relationship of Bendix to the agreement is a jury question, as is the question of whether Bendix had a monopoly in the instant case.

[4] See *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 281.

have drawn an inference in favor of either side.[5] The judge's charge, in taking the question from the jury, was reversible error.

II. Plaintiffs' Cross-Appeal

1. *Since the defendant set up its registered trade-mark as a defense, we think this was an "action * * * involving a registered mark"* within § 37 of the Lanham Act (15 U. S. C. § 1119), conferring jurisdiction to order the mark's cancellation.[5a] *The evidence so clearly shows that the mark was merely descriptive that the judge should have directed the cancellation of its registration.**

2. We think there was a sufficiently "common question" and a sufficiently "common relief" sought to render this a spurious class suit under Rule 23(a)(3). But petitions for intervention made previous to the trial were properly denied, in the court's discretion, when plaintiffs refused to consent to an adjournment to permit examination before trial of the proposed intervenors. The judge did not err

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[5] In support of point (1), plaintiffs put in evidence a survey by the "American Washer & Ironer Manufacturers' Association," which they maintain showed that Bendix made a large majority of the automatic washing-machine equipment in the United States. But the evidence was such that the jury might reasonably have inferred that the Association did not include all washing-machine manufacturers, and that there was no showing that all of the members reported.

Concerning the second point, on the evidence the jury could reasonably have found that defendant used the exclusive distributorship to force plaintiffs to sign franchises, pay fees, conform to store specifications, and purchase supplies. But on the evidence the jury could reasonably have found to the contrary, *i.e.*, that the franchises were voluntary with the operators who voluntarily signed to obtain use of the name "Launderette"; the jury could also have found that the "override" paid by Telecoin covered costs to distributors of services performed under machine warranties, and of carrying special inventory for the commercial machine.

Also in dispute was the value of the services rendered by Telecoin to its operators; a factor bearing on the economic justification of the exclusive arrangement.

[5a] See also 15 U. S. C. § 1115(b)(7).

* Italics supplied.

in refusing to hold open the judgment to permit persons to intervene after the verdict. The suggestion in *York* v. *Guaranty Trust Co.*, 143 F. (2d) 503, 528-529 (C. A. 2), does not apply to a jury case after the trial has concluded, for it would involve a new hearing of the evidence by the jury.

On defendant's appeal, reversed and remanded.

On plaintiffs' cross-appeal, reversed and remanded with directions to enter an order cancelling the defendant's trademark.

APPENDIX B

Charge of the Court

With Colloquy on Respondent's Requested Charge No. 15

New York, November 14, 1951;
10:45 o'clock A. M.

(MURPHY, J.):

Ladies and gentlemen of the jury. You have been patiently and courteously listening to testimony and examining exhibits in this case since October 8th. We are now at the stage of the proceedings where you are about to take up a most important duty. You are going to determine whether the plaintiffs in this action were damaged as they claim because of certain practices alleged to have been carried on by the defendants and, if so, what amount of money would compensate each for that damage.

* * * * * *

The manufacturer of the Bendix washing machine [3486]* (Bendix Home Appliances, Inc.) is not a party to this lawsuit, nor is Bruno-New York, Inc., the otherwise New York distributor of the Bendix machine.

Generally speaking, the plaintiffs complain of the methods and practices employed by Telecoin Corporation and

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* Bracketed figures are the page numbers as they appear in the Typewritten Record.

the two defendants, Percival and Melroy, in connection with the sale of Bendix washing machines during the years 1945, 1946 and 1947.

* * * * * *

Testimony has also been offered in the nature of figures for the purpose of proving that Bendix Home [3491] Appliances, Inc., the manufacturer, had a monopoly on fully automatic washing machines. You will recall that there was a stipulation read into the record to the effect that if a certain man was called he would testify that the total production of fully automatic domestic washing machines reported to Ernst & Ernst by the companies who participated in the statistical program of the American Washer and Ironer Manufacturers Association in 1946 was 361,631 units, and in 1947, 749,083 units. These statistics were not received by the association directly from the manufacturer. The individual manufacturing company sent its statistics to an independent account firm and these figures come from that accounting firm. You will also recall the names of the companies who belonged to the association. There is no evidence what manufacturing companies were not members or how many machines were manufactured by such non-members, if any.

* * * * * *

PART II

I come now to the law applicable to this case. First, I am going to read to you the pertinent provisions of two statutes enacted by Congress relating to controversies such as the one in the present case. Next I will explain to you the meaning of the terms used in these statutes. Then I will indicate the nature of two distinct controversies raised under these statutes by the evidence in this case.

* * * * * *

The terms in this statute [Section 3 of the Clayton Act] are quite similar to some of the ones in the Sherman Act which have already been briefly defined. You will note that neither this statute nor the Sherman Act makes illegal

a mere refusal [3504] to deal with purchasers by a trader in goods. Neither act restricts "the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." He "can sell to whom he pleases." The Clayton Act condemns tying restrictions and tie-in practices which substantially lessen competition or have a monopolistic tendency. These terms I shall explain presently when these statutes are applied to the evidence in this particular case. The statutes which I have referred to and the sections of them which I have read to you are not the only ones involved in this case, but merely ones which are of sufficient importance for consideration at length.

I have outlined the facts first and then the law in a general way. We come now to an application of the law to the facts in this particular case. There are two distinct theories under which the plaintiffs or some of them, may recover damages in this suit if all of the necessary elements under either or both of these theories are established by the evidence. The first of these theories is concerned with the defendants' liability for tie-in sales to the plaintiffs. It involves application of both the Sherman and Clayton Acts to the evidence in this case, and especially [3505] Section 3 of the Clayton Act. This first theory considers the conduct of the defendants by themselves and not in conjunction with the manufacturer Bendix and distributors such as Bruno-New York, Inc. The second theory on which recovery might be predicated is concerned with defendants' liability as resulting from conspiracy. This theory involves the application of the Sherman Act and especially Section one of that Act to the evidence in this case. *This second theory considers the conduct of defendants* not by themselves but *in concert with the manufacturer Bendix and distributors* such as Bruno-New York, Inc. We shall consider the application of these theories in the above order to the evidence in this case.*

* Italics supplied.

Part III

With respect to the first theory of plaintiffs' case, viz., liability of defendants for the tying restrictions in connection with the sale of the home laundry washing machines, the evidence in this case poses four separate questions of fact which must be answered by you. I shall state these four questions and refer to pertinent provisions of law by which you shall be governed in answering each of them:

1. Did defendants make a sale or contract for sale of washing machines to the plaintiffs, or any of them, [3506] upon the condition, agreement or understanding that the purchaser thereof should not use or deal in coin-meters, boilers, clocks, soaps, scales, schedule pads or like commodities, any or all of them, of a competitor or competitors of the defendants?

This is a question of fact to be decided by you on the basis of the evidence in this case with respect to each of these items and for each of the plaintiffs. In answering this question, you will keep in mind that to constitute a violation, you must find both (1) that there was a condition, agreement or understanding that the plaintiffs, or any of them should not use or deal in the aforementioned items, or any of them, of defendants' competitors; and (2) that such condition, agreement or understanding, if there were any, was tied to a sale or contract for sale of washing machines by defendants to plaintiffs, or any of them.

2. Should you answer the first question in the affirmative for the plaintiffs or any of them with respect to the aforementioned items, or any of them, then you must answer this second question for each plaintiff and item for which you answered the first question "yes":

Under the evidence in this case, was the effect of the tying arrangement such as may be to [3507] substantially

lessen competition or tend to create a monopoly in any line of commerce?

You must determine as a question of fact whether as a result of denying plaintiff, if such was the case, the right to buy coin-meters, soap and other aforementioned items from dealers who were competitors of defendants the flow of interstate commerce in such goods was affected by a substantial lessening of competition in them or a tendency to create a monopoly in them by defendants.

The phrase "line of commerce" in this question refers of course to interstate commerce. It is entirely possible to substantially affect interstate commerce by tying restrictions placed upon purchasers located within a single State if the effect is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and intrastate commerce.

The answer to the second question depends upon a showing that the effect of the tying restriction "may be to substantially lessen competition or tend to create a monopoly." This qualifying clause "is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected" i.e., in coin-meters, soap and the other aforementioned [3508] items supposed to be tied to the sales of washing machines. This proof does not require a showing "that competition has actually diminished" in those aforementioned items. The requirement may be met by proof that the alleged tie-in sales covered "a substantial number of outlets and a substantial amount of products, whether considered comparatively" i.e., in comparison with the total amount of coin-meters, soap and other aforementioned items sold by all dealers, "or not."

If you find a restraint of competition in these aforementioned items, there may be a violation of the statute even though defendants' "portion of the national business is small" in such items. On the other hand "the

mere possibility" of lessened competition or creation of a monopoly is not a sufficient showing.

3. Only should you answer both questions one and two in the affirmative for the plaintiffs, or any of them, must you consider this third question, viz.:

Have the plaintiffs, or any of them, in fact been injured in their business or property by reason of anything forbidden by the antitrust laws which has been done by the defendants?

Assuming that you have answered questions one and two "yes" with respect to all of the plaintiffs, or any of them, then you will have found a violation of the [3509] antitrust laws. This third question asks—did violation cause the injury? Injury means any financial damage to the plaintiffs' business or property. May I offer a simple illustration of what is meant by this requirement that the defendants' alleged violation of the antitrust laws cause injury to the plaintiffs' pocketbooks?

Most of you drive automobiles. And you know, of course, that there are laws which regulate speed limits. Suppose on Monday you are driving your automobile down Second Avenue. Suppose further the speed limit is 25 miles per hour. When you approach a crossing, let us say you are driving at 25 miles per hour. The light turns red. You stop your automobile within 15 feet of the crosswalk. Nobody is hurt. There is no violation of law. Everything is satisfactory. On Tuesday you are late for work so you drive down Second Avenue at 40 miles per hour. The light turns red at the intersection and you stop before reaching the crosswalk. A pedestrian crossing in front of your automobile slips on a banana peel, falls and hurts his leg. Here we have a person injured and a violation of law. But your violation of the speed law did not cause the injury.

Now, on Wednesday you are still in a hurry so you drive down Second Avenue again at 40 miles per hour. [3510] The light turns red at the intersection, but you are unable because of excess speed to stop before reaching the crosswalk. A pedestrian crossing in front of your automobile is struck by your car, falls and hurts his leg. Here we have a person injured and a violation of law. But we also have an injury caused by violation of a law. We do not have what happened on Tuesday, viz., an injury while a law was being violated or after it was violated, nor do we have what happened on Monday, viz., no injury and no violation.

Your answer to question three may be either "yes" or "no". Your answer to question three can be "yes" only if you have found a violation of the antitrust laws by answering both questions one and two in the affirmative. In addition, to answer question three "yes" you must find an injury to plaintiffs' business or property. And finally to answer this question "yes" you must find the injury was because of, or by reason of, the violation of the antitrust laws.

The fourth and final question of fact need be considered by you only if you have answered each of the first three questions in the affirmative for the plaintiffs, or any of them. This question concerns the amount of damages for each particular plaintiff. Unlike the first three questions, it cannot be answered by merely "yes" or [3511] "no" with reference to all of the plaintiffs or some particular plaintiff. It must be answered in terms of dollars and cents. And it must be answered in those terms for each particular plaintiff for whom you have answered all of the first three questions in the affirmative. This fourth question is:

What is the amount of each plaintiff's damage which justly compensates him for the injury to his business or property by reason of defendants' violation of the antitrust law?

Only assuming that it will be necessary for you to answer this question at all, these instructions are given. You have heard me read a portion of a statute wherein it says that the plaintiff is entitled to three times the damage. That is something that you need not concern yourselves with. In answering question four you will find only the actual damage. Any trebling to be done will be handled by the Court.

Now, in connection with this first theory of this action, or tie-in theory, you have heard testimony about many items that the plaintiffs may or may not have purchased in connection with the sale of the washing machines. You may consider the coin meters, scales, boilers, wall clocks, soap and sundry items like schedule or appointment pads. But you may not consider in connection [3512] with this theory of the action such items as franchise fees, signs, posters and store alterations relating to dimensional requirements, and standardized type and coloring of walls and floors, all of which items served to identify a store by uniform appearance and conditions. These items are excluded from any consideration of actual damages under this first theory of this action because the defendants had the right to require such uniformity as a condition to the use of its name "Launderette" by plaintiffs.

In fixing damage "the jury may make a just and reasonable estimate based on relevant data." It may act on the basis of not only direct and positive proof but also "just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business." So in this case, for example, in connection with soap, you may take account of the difference in price between soap of similar quality which plaintiffs were allegedly prevented from purchasing from other dealers and the price they paid defendants. The damages do not have to be calculated with exactness; it is sufficient if there is a reasonable basis for the computation.

On the other hand, "the jury may not render a verdict based on speculation or guesswork." [3513] You must find evidence to support the amount which you have arrived at. And only that is damage which is the injury directly consequential upon violation of the antitrust laws.

We come now to the second final theory upon which the plaintiffs might possibly recover. As we have already indicated, *this theory arises from a conspiracy and combination of defendants with others who are not defendants in the action, viz., Bendix, the manufacturer, and its distributors,* especially Bruno-New York, Inc. It is based upon violation of the Sherman Act and especially Section 1 of that act which has already been read and explained to you.*

The principal evidence offered in support of this conspiracy theory is a written contract between Bendix and Telecoin, one of the defendants, marked as Exhibit 11. This agreement, dated April 11, 1945, gives Telecoin the exclusive right within the United States to purchase from from Bendix distributors the Bendix Home Laundry washing machine when intended for use in conjunction with a coin mechanism or for use by multiple patrons in apartment houses, stores or public laundry locations. In this contract, Bendix for its part agreed to use its best efforts to obtain from its distributors a modification of their agreements with Bendix so that the distributors [3514] would not sell the machine to anyone other than Telecoin when such machines were intended for use in conjunction with coin meter mechanisms or for use by multiple patrons in apartment houses, stores or public laundry locations. This agreement amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law. Whether plaintiffs, or any of them, however, may recover damages from defendants for this violation depends on your answers to two additional questions of fact which we shall label question five and question six. These two questions are identical

* Italics supplied.

with the third and fourth questions under the first or tie-in theory of this action which we have already explained. Thus question five is:

Have the plaintiffs, or any of them, in fact been injured in their business or property by reason of anything forbidden by the antitrust laws which has been done by the defendants?

The instructions which I have given you in connection with the third question under the first or tie-in theory apply in connection with this fifth question under the second or conspiracy theory. You must decide whether the violation in fact caused injury to the plaintiffs' pocketbooks. The fact that there was a violation does not establish an injury. It is entirely [3515] possible that plaintiffs might have gained money because of this agreement between Telecoin and Bendix. It is also possible that the plaintiffs might have neither gained nor lost anything by reason of this agreement. In the event you find that plaintiffs gained or neither gained nor lost by reason of the agreement, then your answer to question No. 5 should be "no". If, on the other hand, you find that plaintiffs, or any of them, sustained a loss to their business or property, then you must determine whether that loss was in fact caused by this agreement or not. If not, your answer to question five must still be "no". If the loss was in fact caused by the arrangements between Telecoin, Bendix and Bendix distributors, then you will answer question five "yes".

The sixth and final question of fact for you to decide is identical with the fourth question under the first theory of this action, viz., one of the amount of damage. The sixth question is:

What is the amount of each plaintiff's damage which justly compensates him for the injury to his business or property by reason of defendants' violation of the antitrust law?

The instructions which I have given you in connection with question four apply here, except that [3516] you may consider all items as proper ones of damage and not merely the restricted items which you were permitted to consider under the theory of tie-in under question four. You are entitled in computing the amount of damage under this question to consider "proof of the difference between the amounts actually realized from his business (by a plaintiff or plaintiffs) after the conspiracy became effective, and what, but for the conspiracy, would have been realized by it from sales at reasonable prices." You need not answer this question at all unless you have answered question five "yes". If you have answered question five "yes" with respect to some of the parties, you may answer this question in terms of dollars and cents only with respect to the same parties. There is one further important direction in connection with damages. You may not award any plaintiff damage under question four in theory one and again award him damage for the same item or items under this question.

When you have tested the evidence by these standards, you then come to consider whether each plaintiff has proved his or its case by the required measure, which is by a preponderance of the credible evidence. In other words, each plaintiff must prove that the defendants or some of them violated the statutes that I have described, and that each plaintiff suffered some damage as a result of such violation. In other words, you, in effect, take twenty scales and on each scale put all of the evidence you believe supports each plaintiff's claim and on the other side of each scale all of the evidence which you believe negates his or its claim, and you then determine whether the supporting [3521] evidence outweighs the evidence which negates the claim.

If it does, then you must find for each plaintiff where the scale balances in his or its favor. If it does not, if the scales after this test I have given you, are in even

balance, then the plaintiff in each such case has failed to sustain the burden of proof which he carries, and in that case you must find for the defendants.

From the finding that a conspiracy existed, you can attach that finding to each plaintiff, although each plaintiff might not have proved the conspiracy separately.

Of course, if the credible evidence which negates the plaintiff's claim in each of these scale-weighing analogies outweighs that which supports it then you must find for the defendants.

* * * * * *

Your difficulties in deliberating in this case are considerable because (1) of the great number of [3523] parties involved and (2) the complex nature of the issues to be resolved. There are a number of plaintiffs in this action and throughout my charge I have always directed your attention to the possibility of some, rather than all of them, as prevailing or failing to prevail. The same is, of course, true to some extent of defendants. If Telecoin prevails so, also, must Percival and Melroy, the other defendants. But if Telecoin fails to prevail, it is not necessary that you also find against Percival and Melroy. In such an event, their liability would depend upon the extent of their individual participation in wrongful conduct, if any, of Telecoin. To enable you to give the matter of parties the fullest consideration, I shall present you with a list of the names of plaintiffs and defendants. This list reads as follows:

* * * * * *

I have referred to a second possible difficulty [3525] you may have in this case, namely, the complexity of the issues which you must determine. To enable you to give these also your fullest possible consideration and at the same time facilitate your deliberation, I have prepared a list of the six questions already discussed in my charge and which I shall give to you. This list sets forth these

questions properly arranged under the two theories, with special directions for each question. Your answers to these questions will be your verdict in this case. Your answers must be unanimous to each question which you find necessary to answer. A majority is not sufficient in the Federal Courts. This list of six questions may appear imposing; actually it is extremely simple to answer if you address yourself sharply to each question separately in accordance with special directions before concerning yourself with the succeeding questions.

I shall now read to you from the list these six questions with the directions.

It has a heading called "Verdict".

"Directions: Answer the following questions in the order in which they appear in accordance with special directions for each question and the instructions given you by the Court:"

[3526] THEORY ONE—TIE-IN.

"Question 1. Did defendants make a sale or contract for sale of washing machines to the plaintiffs, or any of them, upon the condition, agreement or understanding that the purchaser thereof should not use or deal in coin meters, boilers, clocks, soaps, scales, schedule pads or like commodities, any or all of them, of a competitor or competitors of the defendants?

"Special Directions. Answer 'Yes' or 'No.' If your answer is 'Yes' with respect to some, but not all, of the parties, you shall also specify by name the plaintiff or plaintiffs and the defendant or defendants.

"Question 2. Under the evidence in this case was the effect of the tying arrangement such as may be to substantially lessen competition or tend to create a monopoly in any line of commerce?

"Special Directions. Answer 'Yes' or 'No.' You may answer 'Yes' with respect to any of the parties only if your answer to Question 1 is 'Yes' with respect to these same parties. If your answer to this question is 'Yes' with respect to some, but not all, of the parties, you shall also specify by name the plaintiff or plaintiffs and the defendant or defendants.

"Question 3. Have the plaintiffs, or any of them, in fact been injured in their business or property [3527] by reason of anything forbidden by the anti-trust laws which has been done by the defendants?

"Special Directions. Answer 'Yes' or 'No.' You may answer 'Yes' with respect to any of the parties only if your answers to both Question 1 and Question 2 are 'Yes' with respect to the same parties. If your answer to this question is 'Yes' with respect to some, but not all, of the parties, you shall also specify by name the plaintiff or plaintiffs and the defendant or defendants.

"Question 4. What is the amount of each plaintiff's damage which justly compensates him for the injury to his business or property by reason of defendants' violation of the anti-trust law?

"Special Directions. Answer in terms of dollars and cents or leave unanswered. You need answer this question in terms of dollars and cents with respect to any of the parties only if your answers to all of the preceding questions are 'Yes,' with respect to the same parties. If you answer this question with respect to any of the parties in terms of dollars and cents, you shall also, of course, specify by name the plaintiff or plaintiffs and the defendant or defendants, together with the corresponding amount.

[3528] THEORY TWO—CONSPIRACY.

"Question 5. Have the plaintiffs, or any of them, in fact, been injured in their business or property by

reason of anything forbidden by the anti-trust laws which has been done by the defendants?

"Special Directions. Answer 'Yes' or 'No.' If your answer is 'Yes' with respect to some, but not all, of the parties, you shall also specify by name the plaintiff or plaintiffs and the defendant or defendants.

"Question 6. What is the amount of each plaintiff's damage which justly compensates him for the injury to his business or property by reason of defendants' violation of the anti-trust law?

"Special Directions. Answer in terms of dollars and cents or leave unanswered. You need answer this question in terms of dollars and cents with respect to any of the parties only if your answer to Question 5 is 'Yes' with respect to the same parties. If you answer this question with respect to any of the parties in terms of dollars and cents, you shall also, of course, specify by name the plaintiff or plaintiffs and the defendant or defendants together with the corresponding amount."

And I will give you both of these papers and you can take them into the jury room with you, of course.

* * * * * *

Mr. Fried: I am reading 15 now:

"Neither the Clayton nor the Sherman antitrust laws prohibits a manufacturer from entering into exclusive contracts for the distribution of its products. Accordingly, the fact that Telecoin was designated as the exclusive distributor of Bendix for commercial purpose is not in and of itself a violation of the antitrust laws."

I do not think, if my recollection serves me correctly, that your Honor charged that.

The Court: I think that that is a correct statement of law, but I do not think that question has arisen in the evidence. I think if I charge it now it will only tend to confuse the jury. There was no question raised about it throughout the trial, about the exclusiveness of that.

I will charge it if it will make you happier.

Mr. Fried: Yes. I think those are the only ones.

The Court: Will you call the jury back, please.

[3539] Mr. Malkan: Your Honor, I am sorry, may I be heard for a moment?

The Court: Yes?

Mr. Malkan: On this exclusive distributorship I believe your Honor's first answer to Mr. Fried was correct, namely, that there was no evidence in this case that this was an ordinary exclusive distributorship, because Telecoin was selling the same thing as everybody else, and I am afraid that now if it is charged separately it will bias the jury. In fact, that is the rock on which the last trial foundered, precisely that, when the jury came in after a day of deliberation, one of the jurors asked Judge Dewey —"Is there anything wrong"—this is on the record, of course—"Is there anything wrong with an exclusive distributorship?"

And Judge Dewey's answer was rather inconclusive; he said there was nothing wrong with it unless it is a monopoly or restraint of trade.

There is no proof that it was an exclusive distributorship other than the statement in the contract that they were the exclusive distributors; and assuming that the proposition of law standing in the abstract might be true, it is misleading as applied here; and, furthermore, it is far outweighed by the entire tenor of the contract which was in restraint of trade.

* * * * * *

The Court: I won't say anything about that exclusiveness until they come back, if they do come back.

Mr. Fried: Then, if your Honor please, we certainly object very strenuously. We think that is the heart of the case. The whole case is bottomed on that.

* * * * * *

APPENDIX C

The Revolutionary Bendix Patents

Excerpt from Testimony of Wm. Doherty, General Manager of International Telecoin Corporation

As you know, the automatic Bendix washer first came into production in 1937. Mr. Farny and Mr. Percival got the idea in late '38 to get into this business of putting a coin meter on a Bendix and putting them in apartment house basements.

Now, prior to that time, for ten years prior to '38, there there were large individual companies across America who were using coin-operated washing machines but they were using the well-known Maytag washer, wringing washer, wringer washing machine before, of course, there was an [2035] automatic washer. Some of these corporations had as high as five or six thousand washing machines in Chicago, in New York, St. Louis, Detroit, Minneapolis, et cetera. I might say there were probably only one or two large companies had this business.

Mr. Malkan: If your Honor please, this is very interesting but it is not——

The Court: Do you have an objection?

Mr. Malkan: Yes, sir, I do, and move to strike out all the remarks about what other people were doing prior to this time.

The Court: If he knows.

Do you know that yourself?

The Witness: Positively, sir. Positively.

Mr. Malkan: I ask on what basis the witness knows what other companies——

The Court: You can cross examine him. He says he knows. Go ahead.

A. (Continuing) Well, of course, coin-operated washing machines were nothing new at that time, but the automatic washing machine was new.

Mr. Farny and Mr. Percival, as I say, when I became connected with them, were just starting the business of coin-operated Bendix washers.

Now, it was new to them. The automatic [2035a] washer, the Bendix, was new. It was still untried. Therefore, there were many, many bugs in the washing machine.

[2036] Q. What do you mean by bugs? A. Well, like in the new washing machine, at first they came out with a zinc tub. The inner tub was zinc. After a while they found that it corroded or rusted. At one time they had to literally exchange every tub that was in a Bendix washer out in a home. *It was an entirely new washing machine.* Don't forget, this Bendix was, as an automatic, was peddled to every washing machine company in America. They all turned it down.*

Vincent Bendix finally got hold of the patents and had enough faith in this machine to know it would revolutionize the washing machine businesses and started it under his name. Then it eventually divorced itself from the Bendix Company and was set up as the Bendix Home Appliances with Mr. Judd Sayre at the head at that time.*

Q. Tell us what Farny and Percival and you did in connection with this new business? A. Well, the new business was purely this, they had the idea of putting them in basements. Here was an automatic washing machine that could adapt itself to the particular type of New York apartment.

A Maytag washer, as you know, is a wringing machine; when you fill the wringer machine, you put water into the machine, it washes; then you take your clothes out and you put it through a wringer, and you have to have a [2037] set tub joining these washers, so that as you come

* Italics supplied.

from the wringer, you go into a set tub of rinse water, you wring into another set tub and rinse with it. So you have the washing machine, your set tub, a set sub, and you need actually a laundry room into which to operate.

This Bendix washing machine was such that it was an entire unit, an entire machine in itself. It washed, it rinsed and it damp-dried, so that once an individual put her clothes into the machine, there was no need for her to touch it from there on in.

In basements, in New York basements, there are hardly any laundry set-ups in the basements. I mean, if you live in an apartment house, you know all you have is your cellar, your boiler room and storage room, and that is all.

In the deluxe houses, yes, you have laundry rooms available, but not in most of the apartment houses. So that this machine could readily adapt itself in any room. I mean, you could set the Bendix washer on the floor here, if you had hot and cold water, if you had a place to drain, and you had an electric outlet.

*Here was a machine that would give thousands and thousands of apartment houses a new laundry service that they never had before.**

* * * * * *

* Italics supplied.

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FILED
JUN 5 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 756

BASCOM LAUNDER CORP., BLUE ROSE LAUNDRY CORP., MORTON KAISER, DANIEL LEVITT, AL ABRAMS, AL ABRAMS and NATHAN NEWMAN, co-partners doing business as FAVORITE LAUNDERS, SIDNEY BENSON, doing business as BENSON'S LESTER COOPER and SAMUEL STEIN, co-partners doing business as COOPER AND STEIN, FAVORITE LAUNDERERS, INC., FLEISCHMANN ENTERPRISES, INC., JOHN L. MACKEY, BEVERLY MACHINE SERVICE, INC., DONALD STANLEY ENTERPRISES NO. 1, INC., ANTHONY FERRANDINO and VINCENT FERRANDINO, individually and as co-partners, ARTHUR ISQUITH, IRVING RANDELL and MURRAY RANDELL, individually and as co-partners, ARTHUR SLUTSKIN, ANGELO ZAGARDO and FRANK ZAGARDO, individually and as co-partners suing for themselves and for all others similarly situated,

Petitioners,

against

TELECOIN CORPORATION,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

CLARENCE FRIED,
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HAWKINS, DELAFIELD & WOOD,
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IN THE

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Petitioners,

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TELECOIN CORPORATION,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Appeals for the Second Circuit which unanimously reversed the judgment rendered after trial before the District Court and a jury has not yet been reported. It appears at pages 23-31 of the petition and pages 357-365 of petitioners' Appendix to their reply brief in the Court of Appeals.

Jurisdiction

The jurisdictional requisites are set forth in the petition.

Question Presented

The basic question is whether the statements of the petitioners should be accepted as true or whether the issues of fact should be presented to the jury for determination as directed by the Court of Appeals.

Petitioners Misstate the Problem

Under "Questions Presented" petitioners have set forth a statement of facts contrary to the evidence at the trial as set forth in the opinion of the Court of Appeals and in our own statement of the case hereinafter.

The petitioners first refer to "Bendix Home Appliances, Inc., sole manufacturer of a patented automatic washing machine of revolutionary design, which bore the famous Bendix trademark * * *." The situation is correctly stated in the Court of Appeals opinion (f. 359):*

> "The evidence at the trial showed the following:
> "In 1937, Bendix Home Appliances, Inc., began producing an automatic home laundry machine."

Bendix was not a party to this litigation and neither its patents nor its trade mark were in issue or in evidence at the trial.

Petitioners' statements as to the purpose of the Bendix-Telecoin contract are not supported by the evidence and represent only petitioners' interpretation of the agreement,

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*References are designated as follows:

To petitioners' appendix (f.).

To pages in respondents' printed appendix in the Court of Appeals (a).

To pages in the typewritten transcript of testimony (T.).

which is summarized in the Court of Appeals opinion (f. 360) as being one

> "* * * by which Telecoin was designated the exclusive distributor of Bendix machines to 'route' and 'store' operators * * *. Bendix agreed to 'use its best efforts' to obtain a modification of existing agreements with its other distributors to protect Telecoin's market, and Telecoin agreed to use Bendix equipment exclusively. The contract provided that Telecoin should buy the machines from other distributors. But as it worked out, the machines were sold directly by Bendix to Telecoin. When Telecoin remitted to Bendix (f. 361), the latter sent a $10 'override' to the distributor in whose geographical area the machine was sold."

The statement that "Bendix then took vigorous action to prevent and substantially succeeded in preventing resales to commercial operators by anyone but Telecoin" is unsupported by any record reference and is contrary to evidence produced at the trial (234a, 235a, 259a).

Petitioners then state "Telecoin thereupon imposed upon its customers various restrictions which Bendix approved * * *." Although an initial draft contract had a form at the end for Bendix' approval, it was shown at the trial that such contracts were withdrawn and that Bendix' approval had never been given to any operator's agreement (Ex. 122, 552a, 307a, 411a). All the plaintiffs were able to produce only two copies of such an initial agreement and the approval form by Bendix was not executed on either (Ex. 122, 552a, 305a, 411a).

At the end of petitioners' statement of "Questions Presented" it is asserted that "The jury found that each of the plaintiffs who purchased from Telecoin was damaged by the contract." This statement is both ambiguous and misleading. It is impossible to say whether the reference is to the Bendix-Telecoin contract or to the Telecoin "Launderette" franchise agreements. If it is to the latter,

the jury specifically found no damage to the plaintiffs from the alleged tie-in sales connected with these agreements. If the reference is to the former the question was not presented to the jury but was precluded by the Court's direction that it was illegal as a matter of law, which, as the Court of Appeals states, "amounted to a directed verdict for plaintiffs on this issue" (fol. 363).

Question number 1 under petitioners' "Questions Presented" appears to us to be correct.

Question number 2 appears likewise substantially correct as a question although it perhaps naturally slurs over the words "as carried out" which become very important here. As stated in the Court of Appeals opinion quoted above, the Bendix-Telecoin contract "as it worked out" was quite different from its terms, which is another important reason why its operation and effects should have been submitted to the jury.

Question number 3 is, in our view, completely erroneous. The question of the Bendix patents and trade-mark were not in evidence or involved at the trial, and petitioners' efforts to extract therefrom some *prima facie* showing of market control or monopoly is perhaps the best indication of the complete lack of any such proof at the trial. Their assertion that "There was no such issue to submit to the jury" reflects their recognition of the absence of any proof in that regard.

Question number 4 is likewise erroneous and misleading. As mentioned above, the jury made no such finding for the reason that the question was never presented to them but was determined for them by the Court's direction that the contract was illegal as a matter of law.

Statutes Involved

The pertinent provisions of the Sherman Act (15 U. S. C. Nos. 1, 2) and Clayton Act (15 U. S. C. No. 14) are set forth in the petition at pages 3 and 4.

Statement of the Case

Petitioners' statement of the case on pages 4 to 15 of their petition is so confused and contains so many misstatements and distortions that it is necessary to present our counter-statement of facts for a proper appreciation of the background of this case.

History of this Litigation

On December 21, 1948, four plaintiffs—Bascom Launder Corp., Blue Rose Laundry Corp., Morton Kaiser, and Daniel Levitt—commenced this action. The defendants originally named included Bendix Home Appliances, Inc., (manufacturer of automatic washing machines), and Bruno-New York, Inc. (a Bendix distributor) (7a). Subsequently the action was discontinued against Bendix and Bruno. Thereafter, by a series of motions, thirteen additional plaintiffs were permitted to intervene (2a); and later the action was converted to a class suit, and more plaintiffs were added, raising the total to 29 (3a).

The complaint charges that the plaintiffs, who purchased Bendix washing machines from Telecoin, were compelled either to sign a franchise agreement for the use of the trade-name "Launderette" or to purchase coin meters with the machines.

A first trial was had before Judge Charles Dewey and a jury from March 19 to April 23, 1951, when the jury was discharged for inability to agree on a verdict. On June 1, 1951 a judgment was entered dismissing the action as to defendant Eugene R. Farny, Chairman of the Board of Telecoin, as to five plaintiffs who failed to appear at the trial and one plaintiff who testified but failed to return for completion of his cross examination. Several plaintiffs voluntarily discontinued.

Nineteen plaintiffs remained when the second trial began. A verdict against Telecoin was rendered Novem-

ber 15, 1951, awarding damages to seventeen plaintiffs. No damages were found in favor of the other two. The jury found in favor of the two individual defendants, Percival and Melroy.

The defendant Telecoin appealed from the above judgment to the United States Court of Appeals for the Second Circuit, which reversed the judgment and remanded the case for a new trial. Plaintiffs filed a cross appeal from the refusal of the District Court to cancel the "Launderette" name and also from the allowance to counsel granted by the District Court. The Court of Appeals directed that the "Launderette" name be cancelled on the ground it was descriptive. Plaintiffs' cross appeal is not here involved.

The Origin of Telecoin Corporation

Prior to 1939 Eugene R. Farny and Arthur W. Percival conceived the idea of attaching coin meters to Bendix washing machines and placing them in apartment house basements for rental by tenants (282a).*

Farny and Percival incorporated the business as Telecoin Corporation on November 20, 1943. Telecoin took over the "route" business—machines in apartment basements—which then numbered 500 to 600 machines (291a). War conditions and the scarcity of machines and other equipment retarded further expansion until near the end of World War II, following which the business grew rapidly, partly as a result of publicity and the desire of individuals

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* Their first installation was in Jackson Heights, Long Island. The machines were purchased from a Bendix distributor. The business was so successful that Farny and Percival decided to sell metered washing machines (285-287a) to other operators. One of their first customers was plaintiff Al Abrams, whose initial investment was $35 (289a), the balance payable by bank note arranged by the sellers (290a). Abrams ultimately purchased over two hundred machines (408a).

to go into new ventures of their own. In the post-war period Telecoin sold all the route locations it had operated (291a) and thereafter sold machines as available, with and without meters, to operators interested in the route business.

Development of "Launderette" System

In November 1944 Telecoin decided to pioneer a new field —the placing of batteries of Bendix machines with coin attachments in stores on a self-service basis. Telecoin's first installation of this type was opened in the Metropolitan Life Insurance Company development known as Parkchester in the Bronx, New York City.*

At that time the name "Launderette" was coined by Telecoin (297a) and was used to designate self-service laundry stores operated by Telecoin.

The success of Telecoin in setting up self-service laundry stores was widely publicized by articles in *This Week,* the *Saturday Evening Post,* and releases in newspapers and trade periodicals throughout the United States (303a).

Bendix-Telecoin Contract

Early in 1945 Bendix, the manufacturer, decided to make use of Telecoin's knowledge and highly successful experience in the operation of its machines on a commercial basis.

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* A second Launderette was opened by Telecoin in Parkchester a few months after the first, and a third in South Bend, Indiana, in the spring of 1945 (298a). The fourth was opened by Telecoin in 1945 in Bethlehem, Pennsylvania, followed by Launderettes in Los Angeles and San Francisco (301a).

The operation of batteries of washing machines raised troublesome engineering, plumbing and electrical which problems, engaged the attention of Telecoin's staff, and experts—engineers and architects —were employed to give assistance (294-98a, 300a).

Telecoin was designated by Bendix as the exclusive distributor for the Bendix machine in the commercial field throughout the United States by an agreement entered into April 11, 1945 (Ex. 11) (536a). It was this contract, described above in the quotation from the Court of Appeals opinion, which the trial court, in its charge, referred to as "The principal evidence offered in support of [the] conspiracy theory" (473a, 504a).

The Bendix machine was designed for home use and not for heavy duty commercial service with a meter mechanism. At this time, prior to the end of the war, the parties were faced with shortages that confronted other industries. Rather than wait for new tools and dies and for development of a model especially adapted for commercial use, Telecoin purchased the standard model and had panels punched for coin meter attachment. A heavy duty clutch, a third bearing, a larger bearing, a bigger shaft, and other improvements found desirable for commercial use were later installed (220a, 452a).

It was not practical to sell machines for *commercial* use with the same one-year warranty allowed on machines for *domestic* use. The warranty for commercial machines was accordingly limited to a 90-day period. Distributors who supplied parts were called upon to keep larger inventories, to determine whether a 90-day warranty or a 12-month warranty applied, and to give to operators of commercial machines substantial discounts in the purchase of parts (223-4a). These business reasons required the exclusive arrangement between Bendix and Telecoin.

The Launderette System

Petitioners claimed that "Telecoin * * * refused to sell machines to operators, including the plaintiffs, unless they signed a [Launderette] 'franchise agreement' ", which required tie-ins of meters, soap, etc., etc. (pars. 17, 20, 58-60a).

Proof of this allegation is wanting.* Telecoin sold 2,906 machines (11.5% of its sales) in 1946 to stores which were not Launderettes. In 1947 this number increased to 9,147 (28.8% of Telecoin's sales) (377-78a). A number of the plaintiffs who were store operators did business without Launderette franchises (238a, 405-6a, T. 487, 1185).

The Launderette system was designed to afford each operator the goodwill attached to the system as a whole. Its essential features were use of the name Launderette on which Telecoin had spent large sums in advertising (376a), territory protection, uniform appearance of stores, aids in construction, equipment and operation, and discounts on parts up to 45% (T. 1026-8).

The system did in fact prove to be profitable for operators; a number of plaintiffs sold their Launderette businesses, realizing substantial gains (199a, 200a, 208-9a, 252-3a, 254a)—one sold his store after two months at a profit of $10,000 (254-5a).

Launderette Franchises

For persons with no prior experience (among plaintiffs were a bus driver, mechanic, lawyer, tailor, pharmacist and photo finisher) the Launderette package was attractive. If a person wished to operate a Launderette—and only in that event—a franchise agreement was required which called for a fee of $2 per machine per month.

The Launderette agreements were changed from time to time. In all cases the contract was terminable at will, except that in one instance (Ex. 40, 545a) 15 days' notice

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* Numerous witnesses testified either that Telecoin did not require a Launderette franchise (391a, 393a, 415a, 434a; T. 335, T. 2068-9), or that they desired such an agreement (124-5a, 152a; Ex. 67, 548a; T. 1511). Plaintiffs Abrams, Randell, Greenberg, Blue Rose and Zagardo operated self-service laundries without the Launderette name as did many others. (See 369a, 413a, 421-2a, 424a; T. 1108-13, T. 1130.)

was required, and in another, 60 days (Ex. X, 571a). The plaintiffs were well aware of this. Whenever they desired to terminate their franchise they merely notified the defendant to that effect (Ex. H, 558a), (Ex. J, 561a), Ex. R, 564a). A number of the plaintiffs operated under Launderette franchises for very brief periods (Levine, 1 month; Zitter, 1 and a half months; Newman and Levitt, 8 months; T. 754, 348, 305, 1222). Others operated self-service laundries with no Launderette franchise (238a, 405a, 413-4a, 421-2a, 424a; T. 487, 1185).

Some plaintiffs complained that they had to buy meters with the machines (Cpt. par. 20, 60a). Yet nine of fourteen plaintiffs who operated stores did so without meters (593a), and others purchased machines with and without meters (T. 337, 268a, 404-5a). Telecoin did recommend the use of meters in Launderette stores for a number of reasons: A metered store reduced the personnel necessary, permitted considerable saving to the operator (314a), and reduced the risk of theft.

An additional and significant reason for use of a meter was that Telecoin had encountered opposition from professional power laundries who stirred up local authorities to invoke zoning ordinances against washing machines in business districts—opposition which Telecoin disposed of by instituting a test case to establish that its system operated on a self-service principle. See *Packer* v. *Board of Standards and Appeals, etc.*, 62 N. Y. Supp. 2d 54 (Sup. Ct., Bx. Cty., 1946), aff'd 271 App. Div. 874, 66 N. Y. Supp. 2d 634 (1st Dept., 1946). An important factor in the case was the use of a coin meter—persuasive proof of the self-service nature of the business. This litigation was financed by Telecoin at the very time a number of plaintiffs were clamoring to get into the business. In fact, several of the plaintiffs testified they were awaiting the outcome before opening their stores (T. 520, 1663).

Launderette Supplies

The third amended complaint alleges that Telecoin required its franchised store operators "to buy various accessories" from it (Cpt. pars. 17d and i, 18, 20, 22; 59-62a).

A number of plaintiffs admitted that Telecoin merely recommended the purchase of supplies (263a, 340a) such as soap, clock, bags, scale, tickets, schedule pads, uniforms, etc.* No single plaintiff bought all the items of merchandise which Telecoin was in a position to furnish or recommend, and the fact is that no two plaintiffs purchased the same articles (Ex. III, 592a).

Route Operators

Five of the plaintiffs were "route operators."**

Route operators, as well as store operators who did not want to use the Lauderette name or system, were referred to the General Sales Division of Telecoin which handled such transactions (319, 329a). Over half Telecoin's sales in 1946 were to route opeartors; in 1947 the percentage was 33.7 (377-78a). The record abundantly establishes that Telecoin sold them machines without meters, as well as with Mark Time meters, Baessler meters and Telecoin meters (239a, 268a, 404-5a).

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* Other witnesses confirmed lack of compulsion in the purchase of supplies (263a, 372a, 382a, 389-90a, 391a, 394a, 417, 434a; T. 2068-9, 2227). Newman testified he "bought supplies where I could get them, and at the cheapest possible price" (T. 321). Friedman felt free to buy supplies elsewhere (T. 700).

** Al Abrams, Sidney Benson, Irving and Murray Randel, Beverly Machine Service, Inc., and Arthur Isquith. The necessity of having coin meters in connection with the operation of this type of business was admitted by Abrams, the largest route operator (402a). Benson specifically requested them (Ex. MMM, 583a).

These operators purchased machines with meters at a price less than they could purchase machines alone from Bendix dealers.† As the trial court remarked, there was no evidence of the price charged by Bendix *distributors* other than Telecoin (461a). And Telecoin's price with meters was far below *dealers'* prices for bare machines (450-1a). This was in a period of O. P. A. controls. Years after the fact these operators claimed that in oral conversations they were told that they could not purchase washing machines without meters. But not a single contemporaneous writing was offered to show that any operator at any time complained of any force or compulsion by Telecoin to require the purchase of meters. The feverish desire to obtain washing machines, regardless of price, was clearly shown (412a, 574a, 583a, 589a).

The Bendix "Monopoly"

There was no proof that Bendix had a monopoly in the manufacture and production of washing machines, and certainly none that Telecoin enjoyed such a monopoly.

There was evidence as to the total output of automatic machines by members of an association who reported production figures in 1946 and 1947 pursuant to a statistical program (T. 1851 *et seq.*). Not all washing machine manufacturers were association members and there was no proof that all members reported their production. Production by individual companies such as Thor, Maytag, Westinghouse and General Electric was not stated. The accuracy of the reports was not established. On this meager basis the District Court permitted evidence that

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† For reasons never explained, plaintiffs have claimed they should have been allowed to buy directly from Bendix wholesale distributors at the same prices they supplied Bendix dealers.

the companies which did report produced 361,631 units in 1946 and 749,083 units in 1947 (274a). During 1946 Bendix produced 287,195 units; during 1947 600,458 units (253a.).

There was no proof that Bendix at any time undertook to control production facilities or acquired sources of material or combined with its competitors in any way to affect production.

There was even less evidence of monopoly by Telecoin. During 1945 very few Bendix machines were shipped to Telecoin. Only about 10% of Bendix' total production was channelled through Telecoin in 1946, and only 5% in 1947. In 1946 and 1947 (the only two years in which it is claimed a conspiracy existed) Telecoin obtained 25,131 and 31,731 Bendix machines, respectively. If all of these machines had been allocated among the 80 Bendix distributors their (T. 1021), 8,000 to 9,000 retail dealers would have received three or four more machines apiece during each year.

During the years 1946 and 1947 the machines Telecoin obtained from Bendix were distributed in the following manner (377a, 378a):

Year	*Apartment House and Route Operators*	*Stores not Launderettes*	*Launderettes*	*Total*
1946	13,565 (54%)	2,906 (11.5%)	8,660 (34.5%)	25,131
1947	10,701 (33.7%)	9,147 (28.8%)	11,883 (37.45%)	31,731

Summary of Argument

Beginning with page 16, petitioners set forth their reasons for urging this Court to grant the writ, but other than the claim that the Court of Appeals decision creates a new legal concept and is a radical extension of the *Bausch & Lomb* case, they argue on the basis of facts (however baseless and distorted they may be) which the jury were never permitted to consider.

Neither a new legal concept nor an extension of *Bausch & Lomb* resulted from the Court of Appeals decision here. On the contrary, the Court of Appeals reaffirmed what this Court held a long time ago in *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 37 (1912):

> "The Owatonna Company did nothing more in its contract with Creamery Package Manufacturing Company than to make that company its exclusive sales agent, and *this is no violation of law.*" (Italics added.)

The Courts of Appeals for the Second and Third Circuits have similarly held that exclusive sales contracts do not constitute violations *per se* of the anti-trust laws. *American Seagreen Slate Co.* v. *O'Halloran*, 229 F. 77, 79 (C. C. A. 2, 1915); *Brosius* v. *Pepsi-Cola Co.*, 155 F. 2d 99, 101 (C. C. A. 3, 1946).

The District Court, in charging the jury that the Bendix-Telecoin agreement (Ex. 11) amounted to a conspiracy as a matter of law, ignored the contested questions of fact and therefore violated the most fundamental rule of jurisprudence prevailing in the United States—that questions of fact are to be decided by a jury.

The *Bausch & Lomb* case is merely the start because it stands for the proposition that an exclusive sales contract is not *per se* illegal. But if we bear in mind that the case

there was tried before the District Court without a jury, and that after reviewing the facts the trial judge came to the conclusion as a matter of law that the exclusive sales contract did not *per se* violate the anti-trust laws, it can readily be seen that the situation here presents, if anything, an *a fortiori* case, particularly when the record is examined. As the Court of Appeals pointed out, the particular paragraph of the contract (537a) upon which the charge was based (that Bendix would use its best efforts to bring about modification of its other distributorship agreements so that distributors would sell machines for commercial use only to Telecoin) was never carried out (Petition, p. 26). Telecoin purchased washing machines directly from Bendix (223a, 412a, 449a). The distributors did sell machines for commercial use (T. 1035) and although Bendix did make some effort "to persuade distributors not to sell machines to operators" it was unsuccessful (235-6a, T. 1116). Similarly there were other provisions of the contract which were never in effect either because they were impractical or were inadvisable in the light of actual experience (Ex. 122, 522a, 307a, 411a).

The sharp and vigorously contested questions of fact can only be appraised and determined by triers of fact upon proper instructions, which the Court of Appeals correctly held were not given to the jury by the District Court. The granting of *certiorari* will not decide the questions of fact present here. Accordingly, the grounds for granting *certiorari* suggested by Rule 38 of the Supreme Court Rules are absent, because there is no conflict in the decision of the Court of Appeals with that of any other Court of Appeals or of this Court. No important question of federal law is involved which should be settled by this Court. Instead of departing from the accepted and usual course of judicial proceedings, the Court of Appeals has simply followed orthodox doctrine as to the clear line of demarcation between the province of a jury and that of a District Judge.

Argument

The Court of Appeals correctly held that the charge of the Trial Court that the Bendix-Telecoin Agreement "amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law" (Petition, p. 30) was reversible error.

As mentioned above, the complaint charged the violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The plaintiffs had demanded a jury trial. The case was submitted to the jury on two theories: (1) whether Telecoin had made tie-in sales in violation of Section 3 of the Clayton Act (468a, 468a *et seq.*) and (2) conspiracy among Telecoin, Bendix and Bendix distributors such as Bruno in violation of Sections 1 and 2 of the Sherman Act (473 *et seq.*). Four written "questions" were submitted by the Trial Judge to the jury on "Theory One—Tie-In" (482a). The jury found defendant had sold Bendix machines with certain tie-ins but that such tie-in arrangements did not tend to create a monopoly or to lessen co petition and accordingly assessed no damages. No appeal was taken from the part of the verdict and it is accordingly not here involved.

On "Theory Two—Conspiracy" the Trial Judge instructed the jury (467a):

> "* * * The second theory on which recovery might be predicated is concerned with defendants' liability as resulting from conspiracy. This theory involves the application of the Sherman Act and especially Section one of that Act to the evidence in this case" with respect to "the conduct of defendants not by themselves but in concert with the manufacturer Bendix and distributors such as Bruno-New York, Inc." (467a).

The District Court was referring to the alleged multipartite conspiracy but failed to indicate even the elements of that offense. To make matters worse, it twice instructed the jury that the Bendix-Telecoin contract, itself, was an illegal conspiracy (473a, 504a).

> "The principal evidence offered in support of this conspiracy theory is a written contract between Bendix and Telecoin, one of the defendants, marked as Exhibit 11. * * * *This agreement amounted to a contract, combination and conspiracy in restraint of trade or commerce in violation of the Sherman Act as a matter of law* * * *." (Italics added.)

The Trial Judge then submitted to the jury the following two questions (484a):

> "Question 5. Have the plaintiffs, or any of them, in fact, been injured in their business or property by reason of anything forbidden by the antitrust laws which has been done by the defendants?
>
> "Question 6. What is the amount of each plaintiff's damage which justly compensates him for the injury to his business or property by reason of defendants' violation of the antitrust law?"

The charge that the Bendix-Telecoin contract was a violation of the antitrust laws "as a matter of law" was erroneous. Bargains for exclusive dealing such as the Bendix-Telecoin contract are valid unless "effecting, or forming part of a plan to effect, a monopoly." *Restatement of Contracts,* American Law Institute, § 516. Many decisions recognize the validity of contracts for exclusive dealing. *United States* v. *Bausch & Lomb Optical Co., et al.,* 45 F. Supp. 387 (S. D. N. Y., 1942), aff'd 321 U. S. 707 (1944); *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (1933); *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U. S. 568 (1923);

Moon Motor Car Co. of N. Y. v. *Moon Motor Car Co.*, 29 F. 2d 3 (C. C. A. 2d, 1928); *Kelly-Springfield Tire Co.* v. *Bobo*, 4 F. 2d 71 (C. C. A. 9th, 1925), cert. den. 268 U. S. 694; *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439 (C. C. A. 6th, 1898).

The *Bausch & Lomb* decision the Court of Appeals properly held was binding and dispositive. There Bausch & Lomb, the exclusive manufacturer of pink tinted eyeglass lenses for Soft-Lite, agreed it would neither manufacture such lenses for anyone else nor compete with Soft-Lite in selling them.

The District Court struck down the Soft-Lite distribution system (with which we are not concerned) but held the exclusive arrangement valid under the Sherman Act. An equally divided Supreme Court affirmed.

The exclusive arrangement in the *Bausch & Lomb* case was more restrictive than the one here. Bausch & Lomb was restricted in its manufacture of pink tinted lenses which had only one use—in eyeglasses. Its entire production was channeled to Soft-Lite. Bendix, on the other hand, for justifiable business reasons made Telecoin an exclusive distributor only with respect to its machines to be used commercially. Ninety percent of its production of the same machines continued to go to 80 or 90 other Bendix distributors.

The District Court in the *Bausch & Lomb* case rested its decision on two grounds: (*1*) that the restraining covenant protected Soft-Lite which was "spending large sums to develop * * * goodwill and enlarge the public patronage of a relatively new article of commerce", and (*2*) that "nothing in the evidence indicates that Bausch & Lomb enjoyed a monopoly in the manufacture of glass for lenses, whether pink or otherwise." 45 F. Supp. 387, 398-9. Stronger reasons support the Bendix-Telecoin contract.

Even stronger reasons exist here for holding that the Court of Appeals was correct in reversing the District Judge because of the erroneous charge to the jury, because in the *Bausch & Lomb* case the Trial Judge was also the trier of the facts, and after viewing all of the facts as well as the law found that the exclusive arrangement between Soft-Lite and Bausch & Lomb did not *per se* constitute any violation of the anti-trust laws. Here the jury was not permitted to pass upon the facts but was directed under the instructions of the Court to remove them from their deliberation and to merely assess the damages.

It seems clear that the Bendix-Telecoin contract was not illegal in and of itself. As the Court of Appeals said in its opinion "the plaintiffs could win only if they proved (1) that Bendix had a monopoly in fact of the product it sold to Telecoin and/or (2) the exclusive arrangement, as carried out, was without a reasonable economic basis and merely served as an instrument for unduly restraining trade." This is substantially the test applied by Chief Justice Hughes in his opinion in *Appalachian Coals, Inc.*, 288 U. S. 344, 360 (1932):

> "* * * The decisions establish, said this Court in *Nash* v. *United States*, 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' See *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Window Glass Manufacturers* v. *United States*, 263 U. S. 403, 412; *Maple Flooring Association* v. *United States*, 268 U. S. 563, 583, 584; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30, 43; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 169."

Economic Basis for Bendix-Telecoin Contract

There was an adequate basis for the exclusive arrangement between Bendix and Telecoin. Telecoin had originated and developed a commercial market for Bendix Home Laundry machines in route operations and its own Launderettes. It had conducted research in the commercial self-service laundry field and had an experienced staff. It had engaged engineers and architects to prepare plans and specifications for the most advantageous arrangement of plumbing and electrical systems. It had developed a uniform method of operating the machines and had reflected credit upon Bendix in their upkeep. It undertook to train purchasers in the operation of the machines, to disclose to Bendix its ideas for improvements, to abide by local ordinances, safety rules, etc. pertaining to commercial installation. Bendix considered that separation of its commercial from its consumer business was necessary and desirable and was anxious that Telecoin's knowledge, successful experience, sales ability, and capital should be employed to promote the manufacturer's goodwill (T. 1037).

Bendix could have retained its commercial business and refused to sell to anyone. It could have sold its commercial business to another and agreed not to compete. In neither case would there be illegality. *Stemmerman* v. *Kelly,* 150 App. Div. 735, 738, 135 N. Y. Supp. 827, 829 (1st Dept., 1912), aff'd 220 N. Y. 756; *Hall Manufacturing Co.* v. *Western Steel & Iron Works,* 227 Fed. 588 (C. C. A. 7th, 1915); *Locker* v. *American Tobacco Co., et al.,* 218 Fed. 447 (C. C. A. 2d, 1914).

Complete Failure of Proof as to Bendix Monopoly

As in the *Bausch & Lomb* case, there is nothing in the record to suggest that Bendix enjoyed a monopoly.* "Mo-

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* See pages 12-13, *supra.*

nopolization" is characterized as a combination or conspiracy "to acquire or maintain the power to exclude competitors from any part of * * * trade or commerce * * * provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power". *American Tobacco* v. *United States,* 328 U. S. 781, 809 (1946). And, *cf., United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 431 (C. C. A. 2d, 1945). The record here falls far short of any showing that Bendix had, or attempted to obtain, a monopolistic position.

The Bendix-Telecoin contract itself was not a conspiracy. Conspiracy may arise from a contract, but the contract and the conspiracy are not equivalents. *United States* v. *Kissel and Harned,* 218 U. S. 601 (1910); *United States* v. *Waltham Watch Co., et al.,* 47 F. Supp. 524, 532 (S. D. N. Y., 1942). Yet the trial judge used the words "contract, combination and conspiracy" interchangeably in denouncing the Bendix-Telecoin contract. Obviously, neither Bruno nor any other distributor was a "co-conspirator" merely because of the contract; proof of participation by them would have to be shown independently. The "conspiracy"—that is, to deny plaintiffs access to distributors other than Telecoin for commercial machines—necessitated active participation by Bruno and others.*

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* The only evidence to support the claim that Bruno or any other Bendix distributor was a party to a conspiracy to deny machines to persons for commercial use was as follows:

> Levitt testified he made one inquiry of Bruno by telephone but was referred to Telecoin because Bruno, in a period of acute shortage, "didn't have any machines" (T. 1216, 243a). This is in direct conflict with testimony by Bruno's witness read by plaintiff (T. 1535), and is at variance with Levitt's testimony by deposition (244a).

(*Continued on following page*)

Facts outside the Bendix-Telecoin contract were relied upon by petitioners and dealt with the inability of operators to purchase machines in quantity from Bendix distributors, but there is no indication in the record whether this inability was due to (*1*) the alleged conspiracy, or (*2*) the natural unwillingness of distributors to sell machines except to their dealers, or (*3*) the unwillingness of distributors to sell to others until their dealers' demands for machines were met, or (*4*) the existing post-war scarcity of such machines. The jury was not allowed to weigh these questions.

It is fundamental that there must be evidence indicating conspiracy between two or more people and of concerted action on their part. *Marino* v. *United States,* 91 F. 2d 691 (C. C. A. 9th, 1937), cert. den. 302 U. S. 764; *National Fireproofing Co.* v. *Mason Builders Assn.,* 169 Fed. 259 (C. C. A. 2d, 1909); *United States* v. *MacAndrews & Forbes Co.,* 149 Fed. 823 (S. D. N. Y., 1906), cert. den. 212 U. S. 585. It is fundamental that there must be evidence that such action will have a tendency to restrict competition unreasonably. *United States* v. *American Tobacco,* 221 U. S. 106 (1911); *Eastern States Retail Lumber Dealers Assoc.* v. *United States,* 234 U. S. 600, 609 (1914); *Paramount Famous Lasky Corp. et al.* v. *United States,* 282 U. S. 30, 43 (1930); *Ruddy Brooks Clothes, Inc.* v. *British & Foreign Marine Ins. Co. Ltd.,* 195 F. 2d 86, 88-9 (C. A. 7th, 1952), cert. den. October 8, 1952.

(*Continued from previous page*)

Benson, who wanted 20 machines (338a), testified that he tried to obtain them from a Richmond distributor, Crump, in 1946 but "could not obtain the machines" from him (T. 2382-4). He then went to Telecoin.

Randell and Cooper testified that machines were unavailable except through Telecoin (T. 1182; 1564), and others that they were referred to Telecoin by Bruno (Gilman, 270-71a; Isquith, T. 1591; Blue Rose, T. 505; Greenberg, 194a). This is not surprising. Plaintiffs wished to buy at least twenty machines at a time, but distributors were allocating machines to their prewar dealers, none of whom obtained the number desired (256-8a).

The jury was never permitted to pass upon the factual questions engendered by the Bendix-Telecoin agreement, namely—

1. Did Bendix in fact use its efforts to cause its other distributorship agreements to be modified? (The testimony shows that although Bendix considered it desirable that the commercial use of the washing machine be handled by Telecoin it was by no means carried out (T. 1535, 1530-2, T. 1035, 1946, 235-6a).)
2. Did the distributors sell only to Telecoin? (The record clearly indicates that the distributors never did sell to Telecoin but instead Telecoin purchased directly from Bendix (223a, 412a, 448a).)
3. Did the distributors refrain from selling Bendix washing machines to the public as the result of a conspiracy? (As to this there was no proof whatever.)
4. Was the arrangement by which Telecoin purchased Bendix washing machines directly from Bendix rather than the distributors merely a substitute for the provision of the contract but nevertheless part of a multipartite, gigantic national conspiracy? (As to this there was no proof whatever.)

The Court of Appeals correctly appraised the record when it pointed out in its opinion that (petition, p. 29)

> "The evidence, however, was not so unequivocal, but, being in conflict and resting on oral as well as documentary evidence, was such that the jury might reasonably have drawn an inference in favor of either side."

Respondent raised other questions of law which the Court of Appeals did not decide, apparently because there was no necessity to do so in view of the remand for re-

trial, but which nevertheless would have to be determined before there could be a final disposition of the case—such as the lack of *prima facie* proof for each plaintiff, the impact of the conspiracy on each plaintiff, the incompetent and inadequate proof of damages, the acceptance of a plaintiff Abram's deposition in lieu of his personal appearance at the trial and the prejudicial conduct of trial counsel for plaintiffs.

Only by a retrial of the case before a jury with appropriate instructions by the Trial Judge can the issues of fact be determined to bring about a final result in this litigation.

Conclusion

No reason exists why this Court should grant certiorari in view of the undetermined questions of fact. The decision of the Court of Appeals delegating to the jury its time honored function is well founded. The petition should be denied.

Respectfully submitted,

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